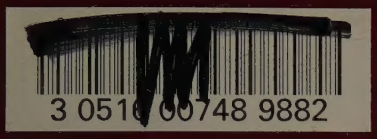
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CRIMINAL SOCIOLOGY

MODERN CRIMINAL SCIENCE SERIES

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THE MODERN CRIMINAL SCIENCE SERIES
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THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY

Criminal Sociology

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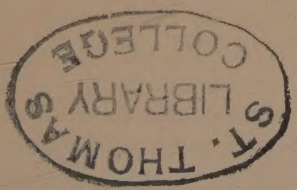

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GENERAL INTRODUCTION TO THE MODERN CRIMINAL SCIENCE SERIES.

At the National Conference of Criminal Law and Criminology, held in Chicago, at Northwestern University, in June, 1909, the American Institute of Criminal Law and Criminology was organized; and, as a part of its work, the following resolution was passed:

"*Whereas*, it is exceedingly desirable that important treatises on criminology in foreign languages be made readily accessible in the English language, *Resolved*, that the president appoint a committee of five with power to select such treatises as in their judgment should be translated, and to arrange for their publication."

The Committee appointed under this Resolution has made careful investigation of the literature of the subject, and has consulted by frequent correspondence. It has selected several works from among the mass of material. It has arranged with publisher, with authors, and with translators, for the immediate undertaking and rapid progress of the task. It realizes the necessity of educating the professions and the public by the wide diffusion of information on this subject. It desires here to explain the considerations which have moved it in seeking to select the treatises best adapted to the purpose.

For the community at large, it is important to recognize that criminal science is a larger thing than criminal law. The legal profession in particular has a duty to familiarize itself with the principles of that science, as the sole means for intelligent and systematic improvement of the criminal law.

Two centuries ago, while modern medical science was still young, medical practitioners proceeded upon two general assumptions: one as to the cause of disease, the other as to its treatment. As to the cause of disease, — disease was sent by the inscrutable will of God. No man could fathom that will, nor its arbitrary operation. As to the treatment of disease, there were believed to be a few remedial agents of universal efficacy. Calomel and bloodletting, for example, were two of the principal ones. A larger or

17468

smaller dose of calomel, a greater or less quantity of bloodletting, — this blindly indiscriminate mode of treatment was regarded as orthodox for all common varieties of ailment. And so his calomel pill and his bloodletting lancet were carried everywhere with him by the doctor.

Nowadays, all this is past, in medical science. As to the causes of disease, we know that they are facts of nature, — various, but distinguishable by diagnosis and research, and more or less capable of prevention or control or counter-action. As to the treatment, we now know that there are various specific modes of treatment for specific causes or symptoms, and that the treatment must be adapted to the cause. In short, the individualization of disease, in cause and in treatment, is the dominant truth of modern medical science.

The same truth is now known about crime; but the understanding and the application of it are just opening upon us. The old and still dominant thought is, as to cause, that a crime is caused by the inscrutable moral free will of the human being, doing or not doing the crime, just as it pleases; absolutely free in advance, at any moment of time, to choose or not to choose the criminal act, and therefore in itself the sole and ultimate cause of crime. As to treatment, there still are just two traditional measures, used in varying doses for all kinds of crime and all kinds of persons, — jail, or a fine (for death is now employed in rare cases only). But modern science, here as in medicine, recognizes that crime also (like disease) has natural causes. It need not be asserted for one moment that crime is a disease. But it does have natural causes, — that is, circumstances which work to produce it in a given case. And as to treatment, modern science recognizes that penal or remedial treatment cannot possibly be indiscriminate and machine-like, but must be adapted to the causes, and to the man as affected by those causes. Common sense and logic alike require, inevitably, that the moment we predicate a specific cause for an undesirable effect, the remedial treatment must be specifically adapted to that cause.

Thus the great truth of the present and the future, for criminal science, is the individualization of penal treatment, — for that man, and for the cause of that man's crime.

Now this truth opens up a vast field for re-examination. It means that we must study all the possible data that can be causes of crime, — the man's heredity, the man's physical and moral

make-up, his emotional temperament, the surroundings of his youth, his present home, and other conditions, — all the influencing circumstances. And it means that the effect of different methods of treatment, old or new, for different kinds of men and of causes, must be studied, experimented, and compared. Only in this way can accurate knowledge be reached, and new efficient measures be adopted.

All this has been going on in Europe for forty years past, and in limited fields in this country. All the branches of science that can help have been working, — anthropology, medicine, psychology, economics, sociology, philanthropy, penology. The law alone has abstained. The science of law is the one to be served by all this. But the public in general and the legal profession in particular have remained either ignorant of the entire subject or indifferent to the entire scientific movement. And this ignorance or indifference has blocked the way to progress in administration.

The Institute therefore takes upon itself, as one of its aims, to inculcate the study of modern criminal science, as a pressing duty for the legal profession and for the thoughtful community at large. One of its principal modes of stimulating and aiding this study is to make available in the English language the most useful treatises now extant in the Continental languages. Our country has started late. There is much to catch up with, in the results reached elsewhere. We shall, to be sure, profit by the long period of argument and theorizing and experimentation which European thinkers and workers have passed through. But to reap that profit, the results of their experience must be made accessible in the English language.

The effort, in selecting this series of translations, has been to choose those works which best represent the various schools of thought in criminal science, the general results reached, the points of contact or of controversy, and the contrasts of method — having always in view that class of works which have a more than local value and could best be serviceable to criminal science in our country. As the science has various aspects and emphases — the anthropological, psychological, sociological, legal, statistical, economic, pathological — due regard was paid, in the selection, to a representation of all these aspects. And as the several Continental countries have contributed in different ways to these various aspects, — France, Germany, Italy, most abundantly, but the others each its share, — the effort was made also to recognize the different contributions as far as feasible.

The selection made by the Committee, then, represents its judgment of the works that are most useful and most instructive for the purpose of translation. It is its conviction that this Series, when completed, will furnish the American student of criminal science a systematic and sufficient acquaintance with the controlling doctrines and methods that now hold the stage of thought in Continental Europe. Which of the various principles and methods will prove best adapted to help our problems can only be told after our students and workers have tested them in our own experience. But it is certain that we must first acquaint ourselves with these results of a generation of European thought.

In closing, the Committee thinks it desirable to refer the members of the Institute, for purposes of further investigation of the literature, to the "Preliminary Bibliography of Modern Criminal Law and Criminology" (Bulletin No. 1 of the Gary Library of Law of Northwestern University), already issued to members of the Conference. The Committee believes that some of the Anglo-American works listed therein will be found useful.

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CONTENTS

PAGE

General Introduction to the Modern Criminal Science Series v
Editorial Preface by William W. Smithers xxi
Introduction by Charles A. Ellwood xxvii
Introduction by Quincy A. Myers xxxv
Author's Preface to the American Edition xxxix
List of Abbreviations xlv

Introduction

THE POSITIVE SCHOOL OF CRIMINAL LAW

I. The classical criminal school inaugurated by Beccaria. The classical penitentiary school inaugurated by Howard. Application of the positive method to criminal law, as in medicine and political economy. In lieu of the diminution of penalties is offered the diminution of crimes, and instead of the abstract study of crime as a judicial phenomenon, the positive study of crime as a natural social phenomenon is advocated 1
II. First accusations against the positive school. The eclectics. Scientific and practical expansion in the new direction 1
III. Criminal Sociology 1

§ 1. Origin of Criminal Sociology 1
§ 2. The Classical Criminal School Inaugurated by Beccaria 2
§ 3. The Classical Penitentiary School Inaugurated by Howard 5
§ 4. Beccaria and Howard and their Limitations 5
§ 5. The Positive Method 7
§ 6. The Positive Method and the Social Sciences 11
§ 7. The Application of the Positive Method to Criminal Law 12
§ 8. The Failure of Classical Criminology 14
§ 9. The Positive Method in Political Economy 16
§ 10. Programme of the New School 18
§ 11. Eclecticism 21
§ 12. The Third School 22
§ 13. The Positive Criminal School is in its Third Period 25
§ 14. The International Congresses of Criminal Anthropology 26
§ 15. The International Union of Criminal Law 33
§ 16. Practical Applications of the Positive School 33
§ 17. Criminal Sociology, — the Programme 36

Part I

DATA OF CRIMINAL ANTHROPOLOGY

Chapter I

NATURAL HISTORY OF CRIMINAL MAN

The genesis of the anthropological criminal school. Methods. Value of data. Observation of Criminals.

PAGE

§ 18. The Genesis of the Anthropological Criminal School 40
§ 19. The Methods of the Anthropological Criminal School 43
§ 20. Value of Anthropological Data in Anthropology and Criminal Sociology 45
§ 21. Craniological Data 48
§ 22. Physical Data 49
§ 23. Criminal Psychology; Moral Insensibility and Lack of Foresight . 49

Chapter II

FUNDAMENTAL OBJECTIONS TO THE DATA OF ANTHROPOLOGY

Methods. Scientific assumption. Disagreement of data. Criminal traits in honest men. Historical and anthropological indetermination of crime. Definition of crime. The criminal type. Origin and nature of criminality.

§ 24. Objections Advanced against Criminal Anthropology 52
§ 25. Methods Employed in the Study of Criminals; Small Number of Criminals Examined 52
§ 26. Method Employed in the Study of Criminals; Inexactness of Comparisons 55
§ 27. Scientific Assumptions of Criminal Anthropology 57
§ 28. Influence of Organic Conditions upon Moral Conduct 58
§ 29. Sources of Objections to Anthropological Data 60
§ 30. Qualitative and Quantitative Disagreements in the Data of Criminal Anthropology 61
§ 31. Disagreements in the Data of Anthropology More Apparent than Real 62
§ 32. Miscitation as the Basis of Criticism of the Use of Anthropological Data 64
§ 33. The Presence of Criminal Traits in the Honest and in the Non-criminal Insane 68
§ 34. Accumulation of Criminal Traits Necessary to Mark the Criminal . . 69
§ 35. Counterbalancing of Criminal by Other Traits 69
§ 36. Variable Predominances of Parents in Offspring 69
§ 37. Criminal Traits So called do not necessarily Result in Crime . . . 70
§ 38. Influence of Circumstances in Restraining the Criminal 70
§ 39. Possibility of Crime Existent in a Man of Criminal Traits at All Ages 71
§ 40. Apparent Honesty in Face of Anthropological Data often deceptive 71
§ 41. Historical and Anthropological Indetermination of Crime 73
§ 42. Indetermination of Crime not All-inclusive 74
§ 43. Connotation of Crime Changes; not so Criminality 75
§ 44. The Social Environment Gives the Form to Crime which has its Base in the Biological Factor 76

PAGE
§ 45. "Mala Prohibita" and "Mala in Se" 77
§ 46. Juridical Crime and the Criminal from a Sociological Point of View 78
§ 47. The Proper Subject of Criminal Anthropology 79
§ 48. Sociological Definition of Crime 80
§ 49. Criticism of this Sociological Definition of Crime; Harmless Acts held Criminal 80
§ 50. Criticism of this Sociological Definition of Crime; Inequality of Penalty 81
§ 51. Eclectic Definition of Crime; Proal 82
§ 52. Durkheim's Definition of Crime 82
§ 53. Biological Definition of Crime; Bahar 83
§ 54. Sociological and Biological Bases of Crime 84
§ 55. Distinction between Anti-human and Anti-social Criminality . . . 85
§ 56. The Existence of an Anthropological Criminal Type 86
§ 57. Physiognomy most important in Determining a Criminal 87
§ 58. Objections to the Determination of a Criminal Type 88
§ 59. Objection based on the Alleged Development of the Thief into the Murderer 91
§ 60. Objection that the Anthropological is a Professional 92
§ 61. Anthropological Criminal Class — a Restatement 95
§ 62. Heredity and Environment 98
§ 63. Criminal Etiology 100
§ 64. Hypotheses as to Nature and Origin of Crime 100
§ 65. Biological Norm or Basis of Origin and Nature of Delinquency . . . 102
§ 66. Sociological Norm as Basis of Origin and Nature of Delinquency . . 103
§ 67. Biological Abnormality as Organic or Psychic Atavism as Basis of Origin and Nature of Delinquency 105
§ 68. Biological Abnormality of Epilepsy as Basis of Origin and Nature of Delinquency 106
§ 69. Biological Abnormality of Organic or Psychic Atavism as Basis of Origin and Nature of Delinquency 107
§ 70. Biological Abnormality of Neurosis or Neurasthenia as Basis of Origin and Nature of Delinquency 108
§ 71. Biological Abnormality or Degeneracy as Basis of Origin and Nature of Delinquency 109
§ 72. Biological Abnormality of Defective Nutrition as Basis of Origin and Nature of Delinquency 110
§ 73. Biological Abnormality of Defective Development of Inhibitive Centers as Basis of Origin and Nature of Delinquency 110
§ 74. Biological Abnormality of Moral Anomaly as Basis of Origin and Nature of Delinquency 110
§ 75. Biological Abnormalities as Basis of Origin and Nature of Delinquency, — Summary 111
§ 76. Basis of Origin and Nature of Crime Complex 115
§ 77. Social Abnormality of Economics as Basis of Origin and Nature of Delinquency 118
§ 78. Social Abnormality of Juridical Inadaptation as Basis of Origin and Nature of Delinquency 119
§ 79. Social Abnormality of Complex Social Influences as Basis of Origin and Nature of Delinquency 119
§ 80. Biologico-social Abnormality as Basis of Origin and Nature of Delinquency 120
§ 81. Crime is a Phenomenon of Biologico-Social Abnormality 122

Chapter III

NATURAL CLASSIFICATION OF CRIMINALS

Precedent. Habitual and occasional criminals. Five fundamental categories: insane, born, habitual, occasional, and by passion. Gradation. Numerical proportions. Other classifications, Conclusions.

PAGE

§ 82. History of the Distinction of Criminal Categories prior to Lombroso 125
§ 83. Conclusions from History of Distinctions of Criminal Categories prior to Lombroso 127
§ 84. Applicability of Anthropological Data restricted to Certain Categories 129
§ 85. Statistics of Criminal Relapse 129
§ 86. Criminal Relapse the Rule 130
§ 87. Proportion of Recidivity in Crimes against the Person 132
§ 88. Proportion of Recidivity in Crimes against Property 133
§ 89. Statistics of Relapse Reinforce Conclusions of Anthropology 133
§ 90. Larger Percentage of Habitual Delinquency 134
§ 91. Percentage in Habitual Delinquency between "Assizes" and "Tribunals" 136
§ 92. Five Categories of Criminals 138
§ 93. The Criminal Insane 139
§ 94. The Mattoide and Semi-insane Categories 142
§ 95. The Born-criminal Category 144
§ 96. The Habitual Delinquent Category 145
§ 97. Precocity and Recidivity; Traits of the Habitual Criminal 146
§ 98. Two Objections to Precocity as a Mark of the Categories of Born and Habitual Criminals 150
§ 99. Objection to Recidivity as a Mark of the Categories of Born and Habitual Criminals 151
§ 100. The Criminal through Passion Category 152
§ 101. The Occasional Criminal Category 154
§ 102. Difference between Categories One of Degree 157
§ 103. Application of Class Division of Criminals 158
§ 104. Numerical Proportions of the Five Categories of Criminals 159
§ 105. Other Classifications of Criminals 160
§ 106. Colajanni and Lombroso Accept the Five Classes of Delinquents 163
§ 107. New Basis for Legal Science 164
§ 108. Five Classes a Natural Division 164

Part II

DATA OF CRIMINAL STATISTICS

Chapter I

METHODS OF COLLECTING CRIMINAL STATISTICS

Moral and criminal statistics. History and statistics. Natural and legal criminality.

§ 109. Importance of Criminal Statistics 168
§ 110. Method of Collecting and Studying Criminal Statistics 169
§ 111. Use and Abuse of Statistics 171
§ 112. Ethico-social Inductions from Criminal Statistics 173
§ 113. Criminal Sociological Demands of Statistics 174

PAGE
§ 114. Biological Aspect of Criminal Statistics 174
§ 115. Statistics and History 175
§ 116. Distinction between Natural and Legal Crime 176

Chapter II

CIVILIZATION AND CRIME

Relation between honest and criminal activity. Anthropological, physical, and social factors of crime.

§ 117. Evolution of Crime. Pathological Incidents of Civilization 178
§ 118. Evolution of Crime in Civilization 178
§ 119. Evolution of Crime 180
§ 120. Crime and Education 181
§ 121. Crime and Ease of Conditions of Life 181
§ 122. Numerical Increase in Crime shown by Statistics 182
§ 123. Actual Increase in Crime 185
§ 124. Anthropological Factors in Crime; Organic Constitution of the Criminals 186
§ 125. Anthropological Factors in Crime; Psychical Constitution of the Criminal 186
§ 126. Anthropological Factors in Crime; Personal Characteristics of the Criminals 187
§ 127. Physical Factors in Crime 187
§ 128. Social Factors in Crime 187
§ 129. Classifications of the Factors in Crime 187
§ 130. Ratio of Civil and Penal Justice 188
§ 131. Criticism of Colajanni's Classification of Crime 189
§ 132. Criticism of Aramburn's Classification of Crime 190
§ 133. Criticism of Tarde's Classification 191
§ 134. Complexity of Origin of Crime 192
§ 135. Ratio of Productivity of Different Factors in Crime 192

Chapter III

PERIODIC MOVEMENT OF CRIME

General data on periodical movement of crime in Europe.

§ 136. The Periodical Movement of Crime 195
§ 137. Crime as Denounced 196
§ 138. Periodical Growth of Crime 197
§ 139. Permanent Increase in Crime 198
§ 140. Increase of Crime; Classicism and Positivism 199
§ 141. Comparative Tables 200
§ 142. Increase in Contraventions and Increase in More Serious Crimes . . 202
§ 143. Increase in Population a Factor in the Increase of Crime 206

Chapter IV

LAW OF CRIMINAL SATURATION

Law of criminal saturation. Slight efficiency of punishment; historical, statistical, and psychological proofs.

§ 144. Law of Criminal Saturation 209
§ 145. Annual Criminal Variations 209
§ 146. Reflex and Complementary Crime 211

PAGE
§ 147. Criminal Supersaturation 211
§ 148. Criminal Supersaturation and Regularity of Crime 212
§ 149. Criminal Supersaturation and Punishment 214
§ 150. Legislative Repression and the Increase in Crime 216
§ 151. Judicial Repression and the Increase in Crime 217
§ 152. Severity and Leniency in Judicial Repression 218
§ 153. Unpunished Crimes as a Cause of Increase in Crime 221
§ 154. Prevention of Crime, not Punishment for Crime Needed 225
§ 155. Three Sociological Strata of Delinquents 226
§ 156. Punishment as a Preventative and the Three Classes of Criminals . 228
§ 157. Prevention the Object of Criminal Laws 230
§ 158. History of Punishment 231
§ 159. Exceptional Penalties and Repression 233
§ 160. Distinction of Fear of Punishment and Repressive Penalties 236
§ 161. Repressive Force of Penalties: a Summary 236
§ 162. Moral Prevention of Crime 239
§ 163. Punishment is a Negative Repressive Force 240

Chapter V

EQUIVALENTS FOR PUNISHMENT

Equivalents for punishment. Examples in the economic, political, scientific, administrative, religious, family, and educational orders. Alcoholism. Vagabondage. Abandoned infancy.

§ 164. Need of Other Means of Social Protection than Punishment 242
§ 165. Penalties. Substitutes 243
§ 166. Penal Substitutes 246
§ 167. Penal Substitutes. Economic Order. Freedom of Emigration . . . 247
§ 168. Penal Substitutes. Economic Order. Taxation 247
§ 169. Penal Substitutes. Economic Order. Public Works 248
§ 170. Penal Substitutes. Relation of Alcohol to Crime 248
§ 171. Physical and Psycho-pathogenic Influence of Alcohol 252
§ 172. Alcoholism and Drunkenness 253
§ 173. Penal Substitutes. Social Order. Poverty and Fatigue 254
§ 174. Repressive Remedies 255
§ 175. Relation of Alcoholism and Crime. Fiscal Remedies 255
§ 176. Relation of Alcoholism and Crime. Remedies of Regulation 256
§ 177. Relation of Alcoholism and Crime. Psychological Remedies 257
§ 178. Relation of Alcoholism and Crime. Therapeutic Remedies 257
§ 179. Penal Substitutes. Economic Orders in General 258
§ 180. Vagabondage and Crime 261
§ 181. Penal Substitutes. Economic Order. Conclusion 264
§ 182. Penal Substitutes. Political Order 264
§ 183. Penal Substitutes. Scientific Order 266
§ 184. Penal Substitutes. Civil and Administrative Order 267
§ 185. Penal Substitutes. Religious Order 271
§ 186. Penal Substitutes. Family Order 272
§ 187. Penal Substitutes. Educational Order 272
§ 188. Penal Substitutes. Neglected Children 274

Chapter VI

PREVENTION AND REPRESSION

Fundamental identity of prevention and repression. The fight against crime and its radical transformation.

PAGE
§ 189. Social Prevention more effective than Penal Laws 278
§ 190. Inevitability of Social Friction. Crime Unavoidable 280
§ 191. Penal Substitutes. A General Argument 281
§ 192. The Importance of the Theory of Penal Substitutes 282
§ 193. Prevention of Crime a Duty for the Criminologist 283
§ 194. No Science of Criminal Prevention 283
§ 195. Crime is Pathological. Need of Prevention 285

Part III

POSITIVE THEORY OF PENAL RESPONSIBILITY

Chapter I

THE NEGATION OF THE FREE WILL

Postulate of the Classical School denied by positivist physio-psychology; and in any event disputable in theory and dangerous in practice. The negation of free will. Eclectic compromise on moral liberty.

§ 196. Problem of Penal Responsibility 288
§ 197. Basis of the Right of Punishment 289
§ 198. Moral Liberty 289
§ 199. Process of Action 290
§ 200. Moral Liberty an Impossibility 292
§ 201. Indivisibility of the Human Mind 295
§ 202. No Free Will Because Will in not an Entity 296
§ 203. Statistics Prove that There is No Free Will 297
§ 204. No Limited Freedom of Will 297
§ 205. Free Will is Denied by Science 298
§ 206. Equivocal Meanings of Moral Liberty 299
§ 207. Examples of Equivocal Meaning of Liberty 301
§ 208. Denial of Free Will is not Fatalistic 303
§ 209. Limited Moral Freedon; Conclusion 303
§ 210. Limited Moral Freedom Important to Sustain Criminal Law 305
§ 211. Theory of Limited Moral Freedom in Practical Jurisprudence 307

Chapter II

THE PROBLEM OF PENAL JUSTICE WITH THE DENIAL OF FREE WILL

Natural defensive reaction. Present reaction. Ethnical character of retributive justice eliminated from the defensive function. Freedom of this function from criteria of liberty and moral defects.

§ 212. Penal Law Denying Moral Liberty 308
§ 213. Basis of Responsibility 309
§ 214. Need of History to determine Basis of Responsibility 310
§ 215. Evolution of Defensive Reaction 311
§ 216. Identity of Military and Legal Reaction 313

PAGE
§ 217. Penal Lack of Recognition of Morality of Act 316
§ 218. Evolutionary Phases of Law 317
§ 219. The Last Evolutionary Phase of Law; the Social Phase 318
§ 220. Development of Penal Law toward the Defensive 320
§ 221. Penal Function defensive and unconnected with Conditions of Moral Liberty 321

Chapter III

OBJECTIONS TO NEGATION OF FREE WILL

The penalty (after the fact) is not a defense (before the fact). Social defense is not legal defense. Positive origin of law in its individual and social aspect. Social defense and class defense in penal law. Atavic and evolutionary criminality.

§ 222. Objections to Theory of Defensive Penal Justice 322
§ 223. (A) Objections to Theory of Defensive Penal Justice: Reparation not Defense 323
§ 224. (B) Objections to Theory of Defensive Penal Justice: Social Protection 325
§ 225. Same Subject: Conditions of Existence 330
§ 226. (C) Objections to Theory of Defensive Law: Influence of the Dominant Class 333
§ 227. Scientific Socialism 334
§ 228. Two Forms of Criminality 335
§ 229. Distinction between Two Forms of Criminality 336

Chapter IV

PRESENT FORMS OF DEFENSIVE REACTION

Theory of natural sanction. Physical, biological, social. Man is responsible for his acts, because he lives in society

§ 230. Punishment not Based on Moral Responsibility 339
§ 231. Punishment Requires Physical Imputability 339
§ 232. Legal Responsibility 340
§ 233. Objection that New Penology is Not Based on Right 341
§ 234. Positivistic Basis of Penal Law 342
§ 235. Physical, Biological, and Social Sanctions 343
§ 236. Kinds of Social Sanctions: Coercive 344
§ 237. The Essential Quality Common to All Forms of Social Sanction . . 345
§ 238. The Essential Quality Common to all Forms of Remunerative Social Sanction 345
§ 239. Social Sanction and Crime 345
§ 240. Moral Culpability must be Discarded as a Prerequisite in Crime . . 347
§ 241. Social Selection 349
§ 242. Moral Culpability an Impossible Basis for Defense of Society . . . 351
§ 243. Social Accountability in Place of Moral Responsibility 352
§ 244. Public Opinion and Social Defense 356
§ 245. History of Treatment of Insanity 356
§ 246. Moral Insanity 359
§ 247. Basis of Right to Punish 360
§ 248. Imputability and Responsibility 362

Chapter V

ECLECTIC THEORIES OF RESPONSIBILITY

Relative freedom of will; limited, ideal, practical. Liberty of intelligence. Voluntariness. Intimidability. Normality. Personal identity and social resemblance. State of criminality. Conclusion.

PAGE
§ 249. Necessity and Free Will 364
§ 250. Development of Rights 366
§ 251. Eclectic Theories of Punishability 366
§ 252. Eclectic Theories of Responsibility, Limited Relation, Liberty of the Will 367
§ 253. Eclectic Theories of Responsibility: Ideal Liberty 368
§ 254. Eclective Theories of Responsibility: Practical Freedom 371
§ 255. Error of Subjecting Science to State of Popular Opinion 372
§ 256. Exigencies of the Idea of Justice 373
§ 257. Eclectic Theories of Responsibility: Freedom of Intelligence 373
§ 258. Eclectic Theories of Responsibility: Voluntarianism 378
§ 259. Eclectic Theories of Responsibility: Intimidability 382
§ 260. Eclectic Theories of Responsibility: Normality — Poletti 390
§ 261. Criticism of the Theory of Poletti 392
§ 262. Criticism of the Theory of Liszt 394
§ 263. The Eclecticism of Tarde 395
§ 264. Original Development of the Eclecticism of Tarde 397
§ 265. Eclectic Theories of Responsibility: Tarde, Personal Identity . . . 401
§ 266. Eclectic Theories of Responsibility: Social Similarity 402
§ 267. Eclectic Theories of Responsibility: State of Criminality 404

Chapter VI

TWO FINAL PROBLEMS OF JUSTICE WITHOUT FREE WILL

Forms of social sanction. Criteria of social sanction: preventive, reparatory, repressive, and eliminative means.

§ 268. Insufficiency of Other Theories of Responsibility than the Positive . 406
§ 269. Application of the Fundamental Principle of Responsibility to Crime 407
§ 270. Greater Importance of Prevention 410
§ 271. The Relations of Criminal and Civil Law 413
§ 272. Positive Means of Social Defense 414
§ 273. Positive Means of Social Defense: Preventive Means 416
§ 274. Positive Means of Social Defense: Reparative Measures 417
§ 275. Positive Means of Social Defense: Repressive Means 419
§ 276. Positive Means of Social Defense: Eliminative Means 419
§ 277. Positive Means of Social Defense: Summary 420

Chapter VII

THE CONDITIONS OF CRIMINALITY

The act, the agent, and the society. The right violated. The determining motive. The anthropological category of the delinquent. Practical examples. Attempts. Complicity. Classical intricacy and positivistic justice.

§ 278. The Criteria to determine the Form of Punishment in any Case . . 421
§ 279. Determinative Motives of Action 423
§ 280. Criticisms of Determinative Motives 424

PAGE
§ 281. Determinative Motives as Applied to Insane Delinquents 426
§ 282. Justification as a Defense 427
§ 283. Difficulty of Proving the Determinative Motives as a Criticism of Them as a Criterion 428
§ 284. The Use of Determinative Motives: An Example 428
§ 285. Criteria Applicable to an Attempt 430
§ 286. Criteria Applicable to Complicity 431
§ 287. Social Accountability: Conclusion 432

Part IV

PRACTICAL REFORMS

Chapter I

INFLUENCE OF THE NEW DATA OF BIOLOGY AND CRIMINAL SOCIOLOGY ON RECENT PENAL LAWS

Parallel penalties aggravating and extenuating circumstances. Asylums for the criminal insane. Special procedures for delinquent minors. Measures against recidivists. Reaction against short-term imprisonments.

§ 288. Influence of the New Data 436
§ 289. Examples of Influence of New Data 438

Chapter II

THREE GENERAL PRINCIPLES FOR PROCEDURAL REFORM ACCORDING TO THE POSITIVIST SCHOOL

Equilibrium between individual rights and social guaranties. The proper office of the penal sentence aside from the illusory dose measurement of moral responsibility. Continuity and solidarity between the different practical functions of social defense. Historical reason and illustrations of the first principle. Exaggerations of the doubt in favor of the accused ("in dubio fro reo") in forms of atavistic criminality. Revision of the trial. Pardons and amnesties. Reparation of the damages. Proposals of the positivist school in the individual direction: popular penal action, reparation of judicial mistakes, least quota of criminality

§ 290. Three Great Principles of the Positive School or Procedural Reform 442
§ 291. The Same Subject 443
§ 292. Examples of Exaggerated Individualistic Tenets. 444
§ 293. Equality between Individual Rights and Social Defense — "Non-proven" 446
§ 294. Equality between Individual Rights and Protection of Society: The State's Right to Appeal 447
§ 295. Equality between Individual Rights and Social Protection: Pardons 448
§ 296. First Form of Individual Criminal Action 451
§ 297. Second Form of Individual Criminal Action 451
§ 298. Reparation to a man unjustly convicted 452
§ 299. Abolition of Certain Crimes 454

Chapter III

THE MACHINERY OF PENAL JUSTICE AND ITS ACTUAL CHARACTER

The proper duty of a penal judgment. The preparation of the case (judicial police). Pleadings (accusation and defense). Trial (the judge and jury). The criminal clinic. Civil and criminal judges. Intelligence and independence of judges. Their election. Powers of the judge.

PAGE

§ 300. The Characteristics of Penal Judgment 456
§ 301. Impersonality 456
§ 302. Characteristics of Penal Judgment: Judicial License 457
§ 303. Characteristics of Penal Judgment; Lack of Organization 459
§ 304. Characteristics of Penal Judgment: Their Impotence 461
§ 305. Proper Duty of a Penal Judgment 462
§ 306. The Phases of Evidence 464
§ 307. Penal Process: Detection of the Criminal; Bertillonage 465
§ 308. Penal Process: Detection of the Criminal; Sphygmography 467
§ 309. Penal Process: Detection of the Criminal: Conclusion 468
§ 310. Penal Process: Trial 471
§ 311. Penal Process: Public Defenders 472
§ 312. Penal Process: The Judiciary 472
§ 313. Penal Process: Scientific Capacity of Judiciary 473
§ 314. Penal Process: Independence of the Judiciary 474
§ 315. Penal Process: The Qualification of the Judiciary 476

Chapter IV

THE JURY

Advantages and disadvantages of the jury as a political institution. The jury from the standpoint of psychology and sociology. Abolition of the jury for common crimes. The most urgent reforms

§ 316. Positivistic Abolition of the Jury System 479
§ 317. Arguments in Favor of the Jury System 479
§ 318. The Jury System: its Advantages and Disadvantages 481
§ 319. The Jury as a Juridical Institution 482
§ 320. The Capital Fault of the Jury System 485
§ 321. The Insufficiency of the Jury: Personal Capacity 485
§ 322. The Insufficiency of the Jury: The Incoherence of its Acts 487
§ 323. The Jury Considered Psychologically and Sociologically 489
§ 324. Disadvantages of the Jury System: the Tendency of the Professional Judge to Convict 490
§ 325. Disadvantages of the Jury System: Psychologically Unfitted for Europe 491
§ 326. Disadvantages of the Jury System: Not Evolutionary 493
§ 327. The Necessity of the Abolition of the Jury System in the Trial of Ordinary Crimes 495

Chapter V

THE "BANKRUPTCY OF THE CLASSICAL PENAL SYSTEMS" AND THE POSITIVIST SYSTEM OF REPRESSIVE SOCIAL DEFENSE

Fundamental criteria of the defensive system. Segregation for an indeterminate time with perioidc revision of sentences. Reparation of the damages as a function of the State. Appropriation of specific measures to the categories of criminals reversing the classical unity of punishment. Common characteristics of the different establishments of segregations.

PAGE

§ 328. The Bankruptcy of the Classical Penal Systems 498
§ 329. Fundamental Criteria of the System of Social Defense 502
§ 330. (A) Segregation for an Indeterminate Period 502
§ 331. (B) Reparation in Damages 509
§ 332. (C) The Choice of Defensive Means for Different Categories of Delinquents 515
§ 333. Prisons must be Hospitals where Delinquency is Treated 518
§ 334. Prisons must not be Places of Ease 519
§ 335. Universal Necessity of Working in Prisons 519

Chapter VI

PRACTICAL REFORMS

§ 336. Insane Criminals and Asylums for the Criminal Insane 521
§ 337. Asylums for the Criminal Insane. Objections. Expense 522
§ 338. The Born Criminal and Capital Punishment 527
§ 339. Theory that no Punishment should be Permanent 533
§ 340. Deportation for Life 534
§ 341. Indeterminate Segregation 537
§ 342. The Cellular System 540
§ 343. Outdoor Work in Farming Colonies 543
§ 344. Classification of Habitual Criminals 545
§ 345. Occasional Criminals and the Abuse of Short term Sentences . . . 545
§ 346. Substitutes for Short-term Sentences 546
§ 347. Substitutes for Short-term Sentences: Conditional Sentence 547
§ 348. Delinquents through Passion: their Relative Impunity 553
§ 349. Summary of Practical Reform 554

Chapter VII

CONCLUSION

§ 350. The Future of Penal Science and Practice 555
§ 351. Relations between Penal Law and Criminal Sociology, and Criminal Sociology and Politics 556
§ 352. Value of Origin of Crime as a Basis of Criminology 562
§ 353. Ultimate Significance of New Discoveries and Methods 563
§ 354. Penal Procedure in the Future 565
§ 355. The Penal Science of the Future 565

INDEX 571

EDITORIAL PREFACE TO THE PRESENT VOLUME

BY WILLIAM W. SMITHERS[1]

THE practical usefulness of this work to students of criminology in this country lies in its assertion and demonstration with doctrinal force of the announced but undeveloped theories of Lieber, ("Essay on Subjects of Penal Law" and "Civil Liberty"), Green ("Crime") and Drähms ("The Criminal"). These writers revealed successive stages of the advanced thought adumbrated by Howard, Romilly and Jebb of England even so far as to indicate the turn from the crime to the criminal, but none of them ventured to declare a school or doctrine even after the pronouncements of the Anthropological Society founded in 1859 had started Lombroso upon his anthropological investigations and flooded Europe with voluminous polemics. It is true that meanwhile many phases of criminology have been earnestly studied, accepted and enacted into legislative mandate. No American writer, however, has devoted such untiring energy to the problem as a whole as Gross of Austria, Tarde of France, Garofalo of Italy or Bonger of Holland. While these men have differed among themselves, they have been earnest and honest investigators and have proffered society a rational, adequate and practical substitute for the futile and long-tried traditional remedies against crime. Of all the European writers, however, none has so fully demonstrated the practical necessity and feasibility of blending the study of the criminal and the ordinary processes of administrative police and judicial procedure, as the man whose work is here presented to the American public in the English language for the first time.

ENRICO FERRI, founder of criminal sociology, and since Lombroso's death perhaps the chief representative of the Italian school of criminologists, was born February 25, 1856, in the little Italian city of San Benedetto Po, in the province of Mantua. After graduating from the Lyceum in Mantua, he entered the University of Bologna in 1874 and became a pupil of Pietro Ellero, then

[1] [Member of the Philadelphia Bar; former Secretary of the Bureau of Comparative Law of the American Bar Association; author of "Executive Clemency in Pennsylvania" (1909), etc., etc.]

professor of Criminal Law, who was also deeply interested in sociological and political studies. From him Ferri derived his inspiration to work in criminal statistics and studies along similar lines. In 1878, when twenty-one years of age, he published his first work, "The Theory of Imputability and the Denial of Free Will." During 1878–9 he studied at Paris and wrote his "Studies of Criminality in France from 1826 to 1878," a work in criminal statistics, which was at once recognized as authoritative by French scholars. In 1879 he returned and entered the University of Turin, where he became a pupil of Lombroso. Through the influence of Ellero he was appointed Professor of Criminal Law in the University of Bologna in 1880. Ferri proved himself a born teacher; from the first his lecture rooms were crowded, and his popularity among students was very great. In 1882, he accepted a call to a similar chair in the University of Siena. Here he completed in 1884 the first edition of his "The Homicide," in which he set forth, for the first time, his well-known classification of criminals. In the same year he also published the first edition of his "Criminal Sociology."

In May, 1886, he was elected a deputy to the Italian Parliament by the Socialist party. For a time his work as a teacher was interrupted by his political activities, but in spite of them he continued his work as a writer along lines of criminology and law.

In 1890 he was called to the University of Pisa for the chair of Francesco Carrara who had been the leader of the classical school of criminal law in Italy. Ferri's socialist activities continued, however, and resulted in 1893 in his being ousted from his chair in spite of the traditional irremovability of "ordinary" professors.

In 1896 Ferri founded and became the chief editor of the Socialist paper "Avanti." At the same time he took up the private practice of law in the City of Rome. During most of this period Ferri was the leader of his party in the Italian Parliament, where he became recognized as an orator of great power and ability. Meanwhile, in the private practice of law he gained a high reputation for ability. In 1904 he was made Professor of Criminal Law at the Royal University in Rome, which chair he has held since that time.

In addition to the works already mentioned, Ferri has published the following along criminological lines:

"I nuovi orizzonti del Diritto e della procedura penale" (1881);

"La scuola positiva di diritto criminale" (1883; translated by Kerr, Chicago, 1906, "The Positive School of Criminology");
"Polemica in difesa della Scuola criminale positiva" (1887);
"Variations thermométriques et criminalité" (1888);
"Delitti e delinquenti nella scienza e nella vita" (1889);
"L'omicidio nell' Antropologia criminale," 2 vols. (1895);
"Les criminels dans l'art et la littérature" (2d ed. Paris, 1906);
"Studi sulla criminalità ed altri Saggi" (1904).

The first Italian edition of "Criminal Sociology" appeared in 1884 and consisted of but 160 pages, while the fifth Italian edition of 1900 contained 1000 pages. A translation, edited by the Rev. W. Douglas Morrison, appeared in England in 1897; it contained, however, only a portion of the original work and omitted most of the copious notes, being based on an earlier edition of the original. The present translation is made from the French edition of 1905 (the latest) which was revised by the author himself.

The distinctive contribution of Ferri to the science of criminology has been his insistence that crime is mainly a social phenomenon, though not to be interpreted exclusively as such. He has sought to reconcile the physical and anthropological with the social elements in the phenomenon of crime. In this he has been highly successful. His "Criminal Sociology" marked an epoch both in criminology and sociology. In general, Ferri adheres to a doctrine of social determinism as regards crime, but he so interprets this doctrine, both socially and legally, as to avoid many of its objectionable elements. In "Modern Theories of Criminality" by De Quirós, translated as Vol. I of the Modern Criminal Science Series, will be found an appreciation of Ferri's place in modern criminal science.

Ferri may be regarded as Lombroso's most distinguished pupil, and, in a sense, as a continuer of his work, though supplementing it on the sociological side and giving it a greater breadth than Lombroso himself showed. Ferri's work on Criminal Sociology may be regarded, therefore, as epoch-making, in bringing together the anthropological studies of Lombroso and his own work in criminal statistics and in criminal law, resulting in the founding in Italy of a new school of positive criminal law, of which Ferri is himself the chief exponent.

The translation of the present treatise has been delayed, because death twice laid its imperative hand upon the enterprise.

Joseph Ignatius Kelly (A.M., Ph.D., Fordham College; C.E., Pennsylvania Military College; LL.B., Chicago College of Law) who began the work, received a cosmopolitan education, traveled and studied in several foreign countries, and finally devoted his talents to the law. His tastes and accomplishments drew him into the historical as well as the philosophical regions of the science. He planned, and had printed in some tentative fragments, an English translation of the Roman Digest,—of which no complete translation has ever been published in English.

In 1906 he was appointed Lecturer on Roman Law in Northwestern University. In 1907 he was appointed Dean of the Faculty of Law of the State University of Louisiana; but after three years was obliged by ill health to resign, and returned to Chicago. Here he began the present translation, while engaging in the practice of international and comparative law. At this time, the fruits of some of his studies were published in the Illinois Law Review: "The Gaian Fragment" (VI, 561), "The *Titanic* Death Liability" (VII, 137).

When the present translation was a little more than one half finished, Mr. Kelly died, in August, 1913; and American scholarship lost a contributor of brilliant promise.

John Lisle (A.B., LL.B., University of Pennsylvania) next took up the translation. After a practical experience in legal affairs as counsel for the Philadelphia Legal Aid Society and for the Society for Organizing Charity, he had become interested in criminology. A study of his on Vagrancy Laws was published in the Journal of the American Institute of Criminal Law and Criminology (V, 498). At the same time his talents in foreign languages were employed in translations for the Committee of the Association of American Law Schools, in their Modern Legal Philosophy Series, — Miraglia's "Comparative Legal Philosophy" and Del Vecchio's "Formal Bases of Law."

On the death of Mr. Kelly, the Editorial Committee of the Institute secured Mr. Lisle's coöperation to complete the translation of the present treatise. Before it was completely revised for the press, Mr. Lisle was drowned at Atlantic City, on June 20, 1915, while performing an act of heroism in attempting to save the lives of others. A more extended account of the life and services of this devoted scholar and publicist will be found in a Memorial by Wm. Draper Lewis, published in the Journal of the Institute (VI, 486).

To complete the revision for the press — a task of considerable extent, in view of the circumstances — the committee secured the skilled services of Mr. George F. Deiser (lecturer in the Law School of the University of Pennsylvania) and Dr. John A. Forst (of the Philadelphia Bar), who have kindly and faithfully revised the text with thoroughness and seen the work through the press. The Committee here offers to them its sincerest thanks, on behalf of the American Institute of Criminal Law and Criminology, for thus enabling this important work at last to be brought to fulfilment.

INTRODUCTION TO THIS VOLUME

By CHARLES A. ELLWOOD[1]

In the opinion of the writer, Ferri should be called the first of living criminal sociologists. And the translation of this, his greatest work, into English is a service for which all students of criminology and sociology should be grateful to the American Institute of Criminal Law and Criminology.

Criminal Sociology may be regarded as a special application of general sociology to the problem of crime and of the treatment of the criminal. Sociology, on the other hand, is a general or synthetic science of the whole life of human society, — its origin, development, organization, and functioning. Criminal Sociology, therefore, comes near to being the whole of Criminology, both in its theoretical and in its practical aspects, so far as the latter aims to furnish a synthetic view of the problem of crime and of the treatment of the criminal as a whole. It is in this sense that our author, Professor Ferri, evidently understands the term "Criminal Sociology" as the title of the present work.

We have a right to ask first of all, therefore, what the social philosophy is upon which Professor Ferri bases his Criminal Sociology. The work before us is not a mere empirical study of the causes and conditions of crime in the social environment. It is rather a Criminal Sociology in the sense in which we have just defined that term. To discover Professor Ferri's social philosophy, however, we must turn to his other works, as well as to his "Criminal Sociology." His "New Horizons of Criminal Law and Penal Procedure," his "Socialism and Criminality," his "Socialism and Modern Science,"[2] and his three lectures on "The Positive School of Criminology,"[3] furnish material which gives us a fairly clear insight into his general sociology. We shall, accordingly, make use of the above works in attempting a critical estimate of Professor Ferri's "Criminal Sociology."

It may be said in general that, among living writers, perhaps

[1] [Professor of Sociology in the University of Missouri. — Ed.]

[2] English Translation by Kerr & Co., Chicago, 1909.

[3] *Ibid.*, 1912.

no one approaches the sociological ideal, in the treatment of the problem of crime, closer than Ferri. He has been, not only a prolific and original thinker in the field of criminology, setting forth among the first a clear theory of the causation of crime, a workable classification of criminals, a social theory of punishment and responsibility, a sociological conception of criminal jurisprudence, and practical suggestions as to the prevention of crime; but he has also, at the same time, had a synthetic view of the relation of all of these to one another and to the general philosophy of society. He eminently deserves, therefore, to be called a criminal sociologist in the true sense, even though one may have to criticize the sociology upon which he builds his general view of the problem of crime.

All this does not mean that Ferri is not to be considered a member of the Italian School of Criminology. To be sure, in some respects, he stands apart from the other members of that school, as broader and more synthetic in his view of the problem of crime. The Italian School of Criminology, it may be said by way of explanation, has, in general, over-emphasized the biological factors in crime. They have, accordingly, placed great stress upon the anthropological study of the individual criminal, and have especially emphasized the doctrine of the "born-criminal" as forming a definite anatomical type. How far Ferri endorses these typical doctrines of the Italian School, we shall see as we proceed. It suffices here to say that as a pupil of Lombroso he is prepared to see whatever truth there may be in these doctrines. Ferri, accordingly, is conspicuous as a defender of the Italian School and as a reconciler of its doctrines with seemingly conflicting facts in the field of criminology.

What then is the sociological background of Ferri's criminological theories? In his "Socialism and Modern Science" Ferri tells us that "Marx complements Darwin and Spencer, and together they form the great scientific trinity of the nineteenth century." Ferri's sociology, in other words, is the sociology of Spencer and Marx, modified in some slight degree by the biological doctrines of Darwin. Now the point of view of Spencer and Marx in sociology is materialistic and mechanistic, though they may not always be so consistently in their practical treatment of social problems. Ferri's point of view also is that of a materialistic and mechanistic monist, though he is not consistently such when he comes to the practical treatment of the problem of crime. He

feels compelled, therefore, at the outset to deny that there is any truth in the doctrine of free will. It may be remarked in passing that his treatment of this doctrine shows the same confusions which we find in most materialistic writers. He avoids the issue as to whether there is any such thing as psychic or rational determination. In places he argues that all the determining factors in activity are ultimately extra-personal; in other places, however, he seems to say that personality is a true factor in the determination of activity, though he does not explain in any place what he means by personality. Hence, his whole argument regarding free will is, from the standpoint of philosophical criticism, confused; and he is certainly very far from meeting the issue involved in that much debated question.

As a consequence of his denial of the doctrine of free will, Ferri finds no place for a doctrine of moral responsibility in any strict sense, but tries to make his doctrine of social accountability take the place of moral responsibility. A more important theoretical consequence, however, is that Ferri's psychology remains essentially the "passive" psychology of the English Associational School which was dominant during the greater part of the nineteenth century. According to such a doctrine of human nature, the individual is essentially the puppet of the forces of environment and of physical heredity, and there is small place for the creative activity of the individual mind.

In all of the above Ferri is a consistent follower of the sociological doctrines implied in Spencer's "First Principles." In the earliest period of his development, indeed, Ferri is almost wholly under the influence of Spencer's sociology. At a later period, however, he became a convert to the practical program of Marxian socialism. Now the social philosophy of Marx, while as materialistic as Spencer's, differs from the latter in that it emphasizes the great rôle played by economic factors in social evolution; whereas Spencer emphasized more especially the physical and biological factors. As is well-known, the background implied in Marx's practical social program was a more or less rigid "economic determinism." To this doctrine Ferri professes nominal allegiance. But finding it impossible to reconcile such a theory with the Lombrosian emphasis upon the importance of the biological, and with the Spencerian doctrine of the finality of the physical factors in all evolution, Ferri in practice so modifies his economic determinism that there can be but little scientific objection to his use of the doctrine.

"There are still those," he says, "who would maintain the one-sided standpoint that the origin of crime may be traced to the social element alone. So far as I am concerned, I have combated this opinion from the very inauguration of the positive school of criminology, and I combat it to-day. It is certainly easy enough to think that the entire origin of all crime is due to the unfavorable social conditions in which the criminal lives. But an objective, methodical observation demonstrates that social conditions alone do not suffice to explain the origin of criminality, although it is true that the prevalence of the influence of social conditions is an incontestable fact in the case of the greater number of crimes, especially of the lesser ones. But there are crimes which cannot be explained by the influence of social conditions alone. If you regard the general condition of misery as a sole source of criminality, then you cannot get around the difficulty that out of one thousand individuals living in misery from the day of their birth to that of their death, only one hundred or two hundred become criminals, while the other nine hundred or eight hundred either sink into biological weakness or become harmless maniacs or commit suicide without perpetrating any crime. If poverty were the sole determining cause, one thousand out of one thousand poor ought to become criminals. If only two hundred become criminals while one hundred commit suicide, one hundred end as maniacs, and the other six hundred remain honest in their social condition, then poverty alone is not sufficient to explain criminality. We must add the anthropological and telluric factors." [1]

Ferri concludes that "Even Socialism, which looks forward to a fundamental transformation of human society on the basis of brotherhood and social justice, cannot elevate itself to the absolute and naïve faith that criminality, insanity, and suicide can ever fully disappear from the earth." [2] It is evident, therefore, that Ferri's allegiance to Marxian dogmas is nominal rather than real, and that it is not sufficient to greatly interfere with the accuracy of his scientific perceptions or the soundness of his theories. However, in his later writings, Ferri has tended to stress to a considerable extent the importance of economic elements in the problem of crime.

A consideration of the economic factor in crime conveniently introduces us to Ferri's whole doctrine of criminal causation.

[1] "The Positive School of Criminology," pp. 59, 60.
[2] *Ibid.*, p. 119.

This doctrine he set forth as early as 1881 in his "Studies on Criminality in France in 1876–1878." It consists essentially of the recognition of three different sets of factors in crime: namely, those in the physical or geographical environment, those in the constitution of the individual, and those in the social environment. Ferri calls these different factors the *anthropological*, the *physical* or *telluric*, and the *social*. The anthropological factors include sex, age, race, organic and psychic constitution, especially individual anomalies, whether physical or mental, acquired or hereditary. The telluric factors are climate, temperature, the fertility of the soil, meteoric conditions, etc. The social factors comprise economic and civic status, profession, social rank, density of population, emigration, public opinion, customs and religion, industrial conditions, government, education, etc. In a word, Ferri finds that crime is a product practically of all the forces of the universe, though these forces manifest themselves in varying proportions in different crimes and criminals. To Lombroso he would give chief credit for the establishment of the importance of the anthropologic factors, and it is especially in the born-criminal, he thinks, that the importance of the anthropologic factor becomes manifest. To writers of the socialist school he would give credit for calling attention to the importance of social and economic factors, and these are seen especially in the occasional and habitual criminals; while to statisticians like Quetelet he would give credit for the establishment of the importance of telluric factors like climate, seen especially in crimes of passion.

The result of this theory of criminal causation is, as we have already indicated, that Ferri gives us a synthetic view of the problem of crime which well deserves to be called sociological. His theory may be summed up by saying that he finds crime to be a biologic and social abnormality, produced in part at least by truly extra-social forces. There can be little objection sociologically to this doctrine. If there is to be any criticism, it must be upon the emphasis which Ferri gives to certain factors. In the opinion of the writer, he over-emphasizes the importance of both the anthropological and geographical elements in crime. This is due to the influence of Lombroso on one hand and of Spencer's materialism on the other hand. Ferri fails, especially in his discussion of the social factors in crime, to bring out the enormous importance of the influence of the "subjective environment," that is, the environment of ideas, ideals, and values which surround every indi-

vidual from childhood up in every social group. While Ferri has in general a sociological viewpoint, yet he fails, on account of his Spencerian and Marxian bias, to give due weight to "the psychic factor," or to get the true viewpoint of social psychology.

Somewhat of the same influences are to be found in Ferri's well-known and widely adopted classification of criminals. Ferri's starting point in his classification is simple enough and beyond criticism on psychological grounds. He first divides all criminals into *habitual* and *occasional* criminals. In the large class of habitual criminals, however, he distinguishes two sub-classes: the *insane criminal* suffering from some clinical form of mental alienation which is the primary factor in his criminal activity; and the *born-criminal*, who has a congenital predisposition for crime. In both of these cases the criminal habit rests upon organic conditions, a fact which distinguishes it very sharply from those cases in which the habit is purely acquired from the contagion of a vicious environment. In the group of occasional criminals, on the other hand, there stands out the class of criminals whose crimes are due to sudden emotion or violent passion. This constitutes a class of emotional criminals, or *criminals by passion*. We have, therefore, the following five classes of criminals: (1) insane criminals; (2) born-criminals; (3) habitual criminals, or criminals from acquired habit in the strict sense; (4) criminals by passion; (5) occasional criminals who commit isolated criminal acts because they are led astray by the conditions of their environment.

There can scarcely be any question but that this classification is based upon observed phenomena and is a workable classification for penological purposes. Rightly understood, as Ferri points out, this classification by no means precludes the complexity of factors causing crime in the case of each class. Thus in the case of the born-criminal, whom Ferri thinks to be, following Lombroso's later theories, the victim of a "criminal neurosis" analogous to the epileptic neurosis, the congenital predisposition is alone not sufficient to produce crime. "A man," Ferri says, "may be a born-criminal, that is to say, he may have some congenital degeneration which predisposes him to crime, and yet he may die at the age of eighty without having committed any crime because he was fortunate enough to live in an environment which did not offer him any temptation to commit crime." In the same way the insane with criminal tendencies may fail of the commission of actual crimes. Thus Ferri's classification is a classification based upon

the predominant trait in each particular class of criminals. In the case of the born-criminal, the hereditary constitution of the individual, or the "criminal neurosis," is the predominant factor. In the case of the insane criminal, the predominant factor is mental disease. In the case of the criminal by passion, it is a certain innate emotional tendency, while in the habitual and occasional criminals the influence of the environment predominates.

Ferri's classification of criminals is to be criticized, if at all, because he fails to base it upon a simple, clear psychological principle, and because it is not the simplest and best classification for the purposes of penological practice. Criminologists are now agreed that there are only three main types of offenders: First, *defective* criminals, whose crimes are due to inborn mental or nervous defects; secondly, *habitual* criminals, who have acquired criminal habits from their social surroundings; thirdly, *occasional* criminals, or "single offenders," who form no criminal habit, but who commit single or occasional offenses through slight defects in character. This classification, based upon the simple psychological principle of habit, has also been found to be best suited to the purposes of practical penology.[1] Manifestly, such a classification does not differ greatly from Professor Ferri's classification. Under the head of the "defective criminal" we should, unhesitatingly, place Ferri's "born-criminal" and "insane criminal," while under the head of "single offenders" we could place his "occasional criminal" and "criminal by passion." The only point of criticism which we would make is that Professor Ferri does not seem to have been perfectly clear as to the principle upon which he based his classification. Recent studies, not available when Professor Ferri first wrote, have made clearer the three main types of criminals.

No small part of the value of Professor Ferri's work lies in the fact that he has not despised the careful discussion of remedial and preventive measures for dealing with crime. Especially must he be credited with being one of the first to emphasize the fundamental importance of prevention and to discuss carefully the whole range of preventive measures. Herein comes what Ferri calls his doctrine of "penal substitutes." Educational, industrial, and moral reforms, he believes can easily take the place of the re-

[1] See article by the writer, on "The Classification of Criminals" in "The Journal of American Institute of Criminal Law and Criminology," vol. I, pp. 536–648.

pressive and retributory measures which were formerly the main reliance of organized society in dealing with crime. In this general view, Ferri is in closest accord with practically all of the advanced sociological and criminological thinking of the present. In regard to the specific reforms which he advocates, it is only necessary to say that the vast majority of them would be endorsed by our most scientific social workers. However, in some cases, Professor Ferri shows the influence of the *laissez-faire* social philosophy which was current during the greater part of the nineteenth century and which Spencer particularly endorsed. The soundest sociological thought of the present does not find much validity in the idea that social mal-adjustment may be prevented effectively by simply letting the individual do as he pleases. In general, however, the preventive measures recommended by Ferri show sound sociological insight.

Thus, as we said at the beginning, Ferri is entitled to rank very high among the sociological thinkers who have directed their attention to the problem of crime. In the opinion of the writer, he should be indeed called the first of living criminal sociologists.

INTRODUCTION TO THIS VOLUME

BY QUINCY A. MYERS[1]

SCIENCE stands constantly at attention and challenges every fact, every symptom, every characteristic, every variation, every sequence, every differentiation, every effect, in its search for causes and exactness. It takes nothing for granted which lacks certitude. When the domain of the human mind is entered, one encounters at once such a mass of suggestive and related facts and phenomena, such a correlation of conduct and mentality with respect to crime and its punishment and the treatment of the perpetrator, as to bewilder him. Few have the opportunity, and still fewer the ability, to view these matters in their true relations, and yet they lie at the very root of society. Tireless and patient investigation through years, such as comparison of individuals and classes of individuals, as to heredity, environment, congenital conditions, and traumatic effects, present us with rational solutions as to the causes of many crimes, and thereby lead to provisions for the practical administration of criminal laws and efficient treatment of criminals and defectives. Such investigations deserve the greatest support as the most valuable aid to this complicated and most important aspect of social economy.

It is daily becoming more evident that the public is becoming better informed and is coming to understand that the subject is of vital importance to the welfare of the race. The opportunities consequently are being multiplied, and the funds are being provided, for these investigations and for such practical demonstrations in the penal and correctional institutions as promise present relief and ultimate rational procedure in the administration of the criminal laws, and in the correction of individual cases. The same scientific movement prompts due observance of insanity, inebriacy, feeble-mindedness and other deficiencies in their relation to the causation of crime.

[1] Of the Indianapolis Bar; former Chief Justice of the Supreme Court of Indiana, and former President of the American Institute of Criminal Law and Criminology.

Investigations in penology promise much and have advanced the science along many lines, both practical and theoretical. Art may bind and shackle the hand; it may become conventional, as is frequently disclosed in architecture and allied arts; but science must distinguish, especially when we come to deal with the human mind and the human being in his relation to the social compact and the obligation of that compact to him, since both involve moral, social and economic questions of the highest and gravest importance. The alienist, the economist, the pscychiatrist, the sociologist, the psychologist, psycopathist, the criminologist, the public administrator and the public at large are alike interested in the ultimate results which must flow from observations in these different fields of labor.

The courts themselves, as related to the final drama in the career of the criminal or defective, are too engrossed with administrative features to be able, if they were competent, to deal justly, by which we mean intelligently, with each individual case. But, present the data and reliable information upon which to base its conclusions, and the court may, and will, deal justly with society and with the individual. It cannot, in the very nature of things, in our complex civilization, and in the face of the swift changes in our social order, give the attention which the individual cases ought to receive — for that is a work of specialization in itself — for lack both of time and opportunity, and this work, if done at all, as it must be, must be done by others. This lays special emphasis upon the field of work and the duty of the American Institute of Criminal Law and Criminology

It has been the frequent inquiry, if not the conviction, of those charged with the administration of the criminal laws, whether the accused is not often one who requires treatment rather than punishment. If courts are to be directed by legislative enactment, it is important that the enactment itself be not merely legislative empiricism, but scientific deduction from reliable sources of information. In other words, it is not exclusively a legal science. The premises become totally dissimilar when we are confronted with mental phenomena, whether of pronounced psychosis, or weakmindedness, from those which obtain in the world of physical phenomena. This is exemplified in the modern treatment of criminals with respect to employment, notably with respect to the occupation of criminals on the public roads. The plan has been bitterly opposed for years on many grounds. Now it so happens that the plan has been

adopted in a number of the states, and the result has been so strikingly at variance with many preconceived notions, that many men who were opponents have come to be firm adherents of the system. It only demonstrates that mental attitudes may be largely controlled by physical conditions, and the apparent truth of yesterday is the contradiction of to-day by the very fact of trial and experimentation.

That the era of understanding, and consequently of rational investigation into, the case of the individual misdemeanant and the criminal has set in. That we have come to the point of distinguishing maliciousness from diseased mentality, and to recognize the subject as one for the specialist on many lines, is demonstrated by the increasing interest and the marked development of the allied sciences bearing upon the subject, and by the humane provision made at public expense to permit exhaustive study by capable persons for ascertaining the true and just relation of the individual to his offense. Invaluable aid is thus given to courts and administrative officers, with justice to the individual and society at large. It comes to the question of subjective treatment of the individual as against the purely objective question of placing offenders in jails or prisons.

It is therefore both refreshing and encouraging to find in this field of endeavor the scientific arrangement, and the careful and exhaustive treatment of many of these questions, coupled with carefully selected data, and correlated facts, and scientific deductions, as found in the proof sheets of Prof. Ferris' invaluable contribution to the Criminal Science Series. Its readers will find in the scientific arrangement and analysis of the work itself ample food for reflection. Those interested in the science will here find added inducement to further study and elaboration of these important subjects, so closely allied to the everyday experience of all who have to deal with them in an administrative capacity.

AUTHOR'S PREFACE TO THE AMERICAN EDITION

A NEW American edition of my "Sociologia Criminale" affords me the greatest satisfaction, — not so much for the personal pleasure in the acquisition of a great public like that of North America, as for the higher reason that its appearance confirms the work of scientific germination, which is an inevitable phase for every new doctrine.

After the first and more clamorous affirmations of the positivist criminal school in Italy thirty years ago, there suddenly ensued a second phase, that of active controversy for and against the new theoretical and practical mode of considering crimes in their natural genesis and penal justice as an instrument of social defense against criminals.

In Italy and in continental Europe the philosophical traditions in penal justice were and are so deeply rooted and so strong that the doctrines of the new criminal school, according to which the foundations of criminal justice are based on the facts of biology and of criminal sociology rather than on the abstract idea of law, were necessarily destined to arouse the most ardent enthusiasm as well as the most relentless and violent opposition. But this noisy polemical phase was succeeded by a period of relative silence, both because of the exhaustion of the controversy itself, and because of the natural decrease of scientific production, which could not continue with the wonderful fertility of the first ten years of life of the new criminal school.

This silent phase, which I have called one of scientific germination, i.e. one, which instead of representing, as some superficial observers believed, a subsidence of the new ideas, represents rather their taking hold in the public mind, — as grains of wheat just sown seem scattered and lost, while in reality in a phase of slow germination they prepare for growth and development as a productive sprout.

The same phenomenon occurred with respect to the classical school, which was heralded by Cesare Beccaria in his celebrated work on "Crime and Punishment," first published anonymously in 1764, when the social atmosphere was vibrating with the

humanitarian movement which fulminated the American and French Revolutions. The first appearance of a reformed doctrine of penal justice, thus launched by Cesare Beccaria, brought about a period of violent polemic, favorable and unfavorable, and marked by a great enthusiastic outburst, from the encyclopedists of France to the reigning sovereigns like the great Leopold of Spain and the Emperor Joseph II of Austria. But after that flash of enthusiasm, Beccaria and his doctrine were for a time almost forgotten by the civilized world through public indifference. Beccaria died in 1794, and only after 1850 were his proposals recognized in the penal legislation of Europe and America and generally accepted by public opinion.

The doctrines of Beccaria, however, were not so profoundly radical as the doctrines of the positivist criminal school. They left penal legislation on its metaphysical foundation of "retributive justice," whereby punishment in the form of penalty should be proportioned to the crime as the effect of a moral fault. Beccaria did not contemplate the elimination from penal justice of the surviving barbarous ferocity in penalties such as corporal punishment, death, torture, confiscation. Yet, in spite of the limited range of his innovation, nearly a century elapsed before his ameliorating doctrine won the assent of legislators and judges or were approved by public opinion.

The doctrine and proposals of the new criminal school are a much more profound innovation. It holds that crime is to be studied in its natural and social causes, because a crime is *always* the effect of an anomaly or of a pathological condition, permanent or transitory, in the individual and in society itself. And, on this account, penal justice, instead of having a mission of measuring the "moral fault" of the delinquent (a measure which is unalterably impossible), and of measuring a "proportionate punishment" (a proportion which is impossible, because, for instance, science and practice can have no absolute criteria by which to determine whether the proportionate punishment for murder should be death, life imprisonment, or imprisonment for a certain number of years), instead of this mission, penal justice can only be a tactical defense against the danger and the injury represented by crime; a kind of hygiene and clinic against the disease of criminality, analogous to the social function of hygiene and sanitary clinic against cholera, typhus, diphtheria, yellow fever, or mental alienation. It was therefore natural that the proposals of the

positivist criminal school should not be able to conquer in the brief space of thirty years the unanimous consent of legislators, of jurists, and of public opinion, if the doctrines of Beccaria required nearly a century.

But since crime is above all marked by daily occurrence in social life and follows every civilization like a shadow, changing only its form and intensity according to the stages of the social evolution, so every day the attention of the public and of the students (legislators, judges, lawyers, teachers) is drawn to the problem of criminality, particularly when some notorious crime or criminal trial specially excites public curiosity, either on account of the extraordinary circumstances of the deed or the exceptional quality of the victim or of the delinquent. Hence, every day the doctrines and proposals of the positivist criminal school are spontaneously recorded more or less effectively in the public conscience: as is demonstrated by the fact that, at every celebrated trial the daily press discloses with more or less fidelity the conclusions of anthropology and of criminal sociology.

These are the natural reasons which determined that work of scientific germination to which I referred a moment ago.

Another reason even more suggestive should be added to them. It is our experience (noted every day, in every country, on both sides of the ocean) that the penal laws, inspired as they still are by the traditional doctrines, are powerless to preserve civil society from the scourge of criminality. Extreme severity and extreme mildness of punishment have equally proven inefficacious. It is like the other empiric measures taken against infectious disease before science had discovered the precise cause in the existence of pathogenic microbes. Penal justice to-day, confronted with the social disease of criminality, is in the same condition as that of medicine and sanitary police when confronted by cholera or typhus before Pasteur and Koch had indicated the precise and positive cause.

Faced by this daily bankruptcy of penal justice as a defense of society against crime, it is inevitable that there should be a more or less changed orientation of public opinion in relation to the theoretical researches and the practical proposals of anthropology and criminal sociology. Indeed, in the countries where the practical phase is stronger and where the academic traditions are least deadening, we observe for some years back a continuous work of partial reforms, of penal legislation, which, while in evident con-

tradiction with the philosophical premises of the traditional doctrines, are nevertheless the recognition, although not confessed, of the new doctrines of criminology. The Anglo-Saxon countries, England and the United States, have thus established themselves in this new path.

While the traditional doctrines of penal justice say that the delinquent is to be punished when he has committed the act while having the use of his moral liberty, intelligence, and will, and that therefore a madman who has committed a crime should be held guiltless, England has given the example of institutions for the criminal insane. These asylums for the criminal insane are naturally approved by criminal sociology; but were and are opposed by the traditional doctrines of penal law. Hence we see that in the Latin countries and even in Germany through the influence of the tradition of juridical philosophy, institutions for the criminal insane are combated in theory and hence are badly organized in practice. The traditional doctrine is that every crime should be followed by its sentence and every sentence should be executed. In the United States, on the contrary, the example of a conditional sentence has been set, together with a probation system for the less dangerous and the non-habitual criminals, and for those to whom a sentence of a few days in prison would be useless and injurious.

The conditional sentence also has been approved by the new criminal school (especially as a form of transition to a new judicial order); while it is combated by the criminalists of the traditional school. Thus, for instance, in Germany the application of a conditional sentence has not yet been obtained, because it remains offensive to the principle of metaphysical justice. In like manner, the United States have given the example of a special court for juvenile offenders. This too is a blow to the traditional and philosophical doctrines; but it is a wise concession to practical utility, being in perfect theoretical accord with the doctrines of anthropology and of criminal sociology. The reclusion of dangerous criminals for an indeterminate time is a proposal of the positivist criminal school, since it would be as absurd to say that a murderer should remain in prison twenty years rather than fifteen or thirty as it would to say in advance that a sick person should stay in a hospital ten days rather than twenty or fifty. As the sick person is kept in the hospital just as long a time as is necessary for his cure, and as the insane patient remains in the asylum all of his life

unless cured and leaves it when he is cured, so it should be with the delinquent, who in the circumstances of the act, in his personal condition, and in the conditions of the social medium, shows himself unfit for a life of liberty; for him, conditional sentence, infliction of fines, and reparation of damage are not suitable.

Further, imprisonment for an indeterminate period (with necessary guarantees for individual and family rights as for the insane), while haughtily combated by the jurists of the classical and the metaphysical school, continues its conquest of the practical common sense of legislators in America and in Europe.

I might say of judicial police, that it is constantly making greater demand upon the researches of biology and criminal sociology, and sees in the scientific study of delinquent man the means of succeeding with greater certainty in the discovery of criminals. Mention could likewise be made of the application of experimental psychology to criminal procedure in testing the credibility and the value of oral testimony.

All of these applications and reforms are practical. Of this, my work on criminal sociology offers a logical and rational demonstration—not by means of the abstractions of metaphysical philosophy, but with the scientific method of observations and positive induction.

A further reason why I am much gratified with this American edition of my book, is that its publication is due to the kindly initiative of my learned colleague, Professor Wigmore, of the Northwestern University School of Law in Chicago.

The social medium of the United States, with a strong orientation towards the practical things of life, cannot but be favorable to a method so practical and so demonstrable in the consideration of a social function so lofty and important as penal justice,—the protection of homes and men from criminals. And since the new North American progress in the living phases of individual and social existence tends to realize the theoretical systems of the thinker (and this is as characteristic of youthful peoples as of individuals), so I hope and augur that the American edition of my work will be kindly received by those representatives of American scientific thought who have already placed so many luminous beacons along the highway of modern civilization.

ENRICO FERRI

University of Rome

LIST OF ABBREVIATIONS IN TITLES OF BOOKS

Saggi.....La negazione del arbitrio libero ed altri saggi.
Teorica del imputabilità..Teorica dell' imputabilità e la negazione del arbitrio libero

LIST OF ABBREVIATIONS IN TITLES OF PERIODICALS

A. A. C.....Archives d'anthropologie criminelle.
A. C. Cr. A.....Actes du congrès d'anthropologie criminelle.
A. F. S.....Archiv für Strafrechtswissenschaft.
A. H. P.....Annales d'hygiène publique.
A. I. I. S.....Annales de l'Institut international de Sociologie
E. M. P.....Annales de la médecine psychologique.
A. P.....Archivio di psichiatria e scienze penale.
A. S.....Archivio di Statistica.
A. S. R. A.....Atti della Società romana d'antropologia.
B. E.....Biblioteca dell' economia.
B. I. I. S.....Bulletin de l'Institut international de Sociologie.
B. S. A.....Bulletin de la Société d'anthropologie.
B. S. G. P.....Bulletin de la Société générale des prisons.
B. U. S. D. P....Bulletin de l'Union internationale de droit pénal.
C. R.....Comptes rendus au congrès pénitentiaire de Stockholm.
E. N.....L'Ere nouvelle.
G. M. G.....Giornale del ministero di Giustizia.
J. E.....Journal des Economistes.
J. M. S.....Journal of Mental Science.
J. S. S.....Journal of Statistics of Sociology.
J. T.....Journal des Tribunaux.
M. M. L.....Manuale della medicina legale.
N. R.....Nouvelle revue.
R. A.....Revue d'anthropologie
R. C.....Rivista carceraria.
R. D. M.....Revue des Deux Mondes.
R. E.....Rivista d'Europa.
R. F.....Rivista di freniatria.
R. F. S.....Rivista di filosofia scientifica.
R. G.....Rivista di Giurisprudenza.
R. I. S.....Revue internationale de sociologie.
R. P.....Revue philosophique.
R. P. N.....Rivista penologica del Niora.
R. R.....Revue des revues.
R. S.....Revue scientifique.
R. S. F.....Rivista sperimentale freniatria.
S. R.....Scuola positiva.
Z. G. S.....Zeitschrift für das gesammte Strafrechtswissenschaft.

CRIMINAL SOCIOLOGY

INTRODUCTION

THE POSITIVE SCHOOL OF CRIMINAL LAW

I. The classical criminal school inaugurated by Beccaria. The classical penitentiary school inaugurated by Howard. Application of the positive method to criminal law. As in medicine and political economy. In lieu of the diminution of penalties is offered the diminution of crimes, and instead of the abstract study of crime as a juridical phenomenon, the positive study of crime as a natural social phenomenon is advocated.

II. First accusations against the positive school. The eclectics. Scientific and practical expansion in the new direction.

III. Criminal Sociology.

§ 1. Origin of Criminal Sociology — General Considerations.

In the course of the last twenty years a new drift of ideas on the subject of crime and criminals has been forming in Italy, and is rapidly being propagated throughout the scientific world. Neither its adversaries, except when blinded by prejudice, nor its partisans, unless really inconsiderate, can ascribe its progress solely to either the effects of caprice or purely personal efforts. Whenever a new scientific movement is affirmed and propagated, there is in it, as in every other order of facts, a natural phenomenon, determined by the historical conditions of time and place, which it is well to indicate at the outset; for in that way the scientific conscience of the thinker is disciplined and strengthened. The impressive and fruitful development of experimental philosophy since 1850, especially in the biological and psychological study of man, considered as one of the numberless links of the zoölogical chain, and in the positive study of human societies considered as natural organisms, had already formed an intellectual medium and manifested a general trend, of which the recent researches on the phenomena of criminality present but one particular aspect. Beyond these general conditions of modern scientific thought there was in Italy the flagrant and daily con-

trast between doctrines of criminal law developed to the highest degree of metaphysical pedantry, and the frequency of crime, which was considerable, whether compared with that found elsewhere in Europe, or viewed in its periodical progression. It was natural, then, that there should arise a scientific movement which, by following the experimental method of studying social pathology in the manifestation of crime, would aim to destroy this variance between the theory of crimes and penalties and the reality of everyday facts. From these antecedents was born the positive school of criminal law, with the essential object of studying the natural genesis of crime, whether in the delinquent or in the surroundings in which he lives, in order the more appropriately to apply different remedies to different causes. This school of positive criminal law has since been a distinct and vigorous branch of general sociology, under the name of *Criminal Sociology*. This name I gave to it in 1882 in order that it might embrace the experimental data of anthropology, of physio-psychology, of psychopathology, and of criminal statistics, together with the means indicated by science (preventive or repressive) to combat the phenomena of crime.

After these general considerations, we may now indicate more in detail the historical causes of this scientific movement.

§ 2. The Classical Criminal School Inaugurated by Beccaria.

Neither the Romans, with all their greatness in the civil law, nor the jurists of the Middle Ages, were capable of raising criminal law to the dignity of a philosophical system. Beccaria, guided more, it is true, by sentiment than by a strictly scientific spirit, first gave an extraordinary impluse to the study of crimes and punishments and he was followed in the philosophical study of the law by a host of thinkers. Beccaria summarized the ideas and sentiments of the philosophers and the public opinion of his time.[1] Among the different scientific currents, however, which

[1] See on this subject *Desjardins* "Les Cahiers des États généraux en 1789 et la législation criminelle" (Paris, 1883). In the introduction, he sketches the state of public opinion at that epoch and shows that it demanded the reform of the criminal laws. He also speaks there of the hostility and the charges of "social upheaval" which were then encountered by the reformers of criminal law. The present successors of these reformers, forgetting that they represent the revolutionaries of a century ago, have repeated exactly the same charges against the positivist innovators; but they have no more stopped the progress of the new ideas than their adversaries of former times were able to prevent the triumph of principles which to-day are considered orthodox.

could have given birth to his immortal work, there was a pre-eminent one, especially in Italy, which, with a glory as brilliant as it was legitimate, became the classical school of criminal law. This school had and still has a practical object, the *diminution of punishment* and to a large extent its suppression, thus reacting with noble generosity against the cruel empiricism of the Middle Ages. It also had and preserves a theoretical method, the "a priori" study of crime as an abstract juridical being. Some other theories defined themselves after 1800, for example, the correctionalist school, which Rœder, among others, so energetically defended under its double aspect of moral and juridical reformation. Although this school rallied ardent and convinced adepts, especially in Germany and Spain, and to a lesser extent in France and Italy, and although it also represented a generous resistance to the medieval systems of reclusion, still more or less perpetrated among us, it was short-lived as an autonomous school. Two concrete facts were adverse to it. The first is that *under any penitentiary system whatever*, be it harsh or mild, there are always numerous types of criminals whose correction is impossible or extremely difficult and unstable, because they are dominated by an abnormal organic or psychical constitution. The second is, that the original causes of crime have their seat not in the criminal alone, but to a large extent also in the physical and social medium which surrounds him. The reformation of the individual does not by itself suffice to save him from relapse unless a beginning is made by suppressing the external causes, in reforming the medium itself and especially the social organization. When the reform of the individual is possible, it is obligatory and useful, even in the view of the positivist school, for certain categories of criminals, those, for example, who have yielded to temptation, or been carried away by passion. But as the essential foundation of a scientific theory the principle to-day no longer exists. The classical school therefore remained predominant in Italy, with a few personal differences of opinion on certain points, by this or that criminologist, but on the whole unified in method and the general ensemble of principles and deductions. While it almost completely attained its practical object in softening to a very great extent (and sometimes even unduly) the penalties fixed by law, in the domain of theory it gave to the scientific world after so many other masterpieces of Italian criminology, the unsurpassed work of Carrara, the "Programma," where from the "a priori"

principle that "crime is a juridical being, an infraction and not an action," there is accurately deduced with marvellous logical power all the principal abstract juridical consequences of which this principle is susceptible.[1] The glorious scientific cycle, opened by Beccaria, closed with Carrara and the most illustrious modern representatives of the classical school; and while the rising tide of criminality besets us and the classical works, being thumbed in vain, afford us only abstract juridical disquisitions on crime, we see in the courts that the judges, the counsel for the defense and for the prosecution, feel the want and the necessity for positive studies in the anthropology and psychology of crimes and criminals, which of themselves may throw some light on the course of penal judicial procedure.[2] If from the theory of crime we pass to practice, that is, the infliction of punishments, we find, as I have said elsewhere,[3] a clearly analogous process in the history of the classical penitentiary school If this school seems less near to its end, it is because it involves, beyond the ready and inexpensive constructions of syllogisms, with which the treatises and codes are filled, the much more expensive constructions of the architects who build the prisons. Moreover, it has met with very limited application, especially in the large European States, and hence it has not yet disclosed all that is false in its exaggerations. But it is certain that what has already taken place in the historical evolution of the theoretical criminal school, now complete, will also happen, and with the same result, to the practical penitentiary school.

[1] *Carrara*, "Programma" (6th Ed. 1886), Gen. Part, preface I, 21–23, thus in effect explains his method: "The immense chain of rules (prohibitive and primitive) must lead back to one *fundamental truth*. We must find the formula of this principle and tie to it, *deducing from it* particular precepts. A formula ought to contain in itself *the germ of all the truths*. . . . I believe that I have found this single *sacramental formula* and it seems to me that I have seen *come out of it*, one after another, the great truths of penal law. I have expressed it in saying: '*Crime is not a being in fact* but *a juridical being*.' It seems to me that such a proposition opens the doors for the *spontaneous* evolution of *all* of criminal law, *in virtue of a logical and infallible order*." In my preliminary discourse (University of Pisa, Jan., 1890), "de César Beccaria à Francesco Carrara," I indicated with more detail the proofs of this completed and exhausted scientific evolution and of the historic mission of the classical criminal school. See my volume of 542 pages: *Ferri*, "Studi della Criminalità ed altri saggi" (Turin, Bocca, 1901).

[2] For daily applications of the positivist truths in the functioning of penal justice, see my volume, "Difese penali e studi di Giurisprudenza," Turin, Bocca, 1899.

[3] *Ferri*, "Lavoro e Celle dei condannati" in the volume "Studi della Criminalità ed altri saggi" (Turin, Bocca, 1904).

§ 3. The Classical Penitentiary School Inaugurated by Howard.

A few years after the great-minded initiative of Beccaria in Italy, virtuous John Howard began a similar movement in England. For this it sufficed him eloquently to depict the pitiable conditions of material filth and moral corruption in which most convicts wallowed in the various European prisons visited by him; and to describe with enthusiasm the first attempts at isolation in cells, inaugurated by the Abbé Franchi, at Florence (1667), by Pope Clement XII at Rome (prison of St. Michael, 1703), subsequently imitated by the Empress Maria Theresa in the house of correction with 140 cells at Milan (1759), and then by the Viscount Alain XIV in the celled prison at Ghent (1775). This movement carried across to America, developed there and reimported into Europe, became the penitentiary school, in both its discipline — summed up in the formula of three words, isolation, labor, instruction (especially religious) — and in its architecture, which became immovably fixed in the system that Bentham (inventing and presenting it to the English Parliament and afterwards to the French Assembly) termed "panoptic" on account of the radial galleries which permitted the eye of a guard placed at the center of the formidable human hive to watch over all of it. The spirit of reform was in the air in the year 1800. It was at this period that Valsava at Bologna, Daquin in Savoy, Chiarugi in Tuscany, simultaneously with Pinel in France, and Tuke in England, undertook the great modern reform in the treatment of the insane. These unfortunates, who had formerly been kept in irons and loaded with chains (according to the existing philosophical ideas which made insanity, like crime, a fault of the individual), were thenceforward in most instances treated with mildness and enjoyed a relative liberty, to which lately has been added the wholesome hygiene of labor. There was thus a humanitarian impulse of reforms for the insane also which produced the modern school of psychiatry, vivified for many years past by the experimental method.

§ 4. Beccaria and Howard and Their Limitations.

But, to return to crimes and penalties — the two classical schools had exactly the same starting point, the same direction, and the same destination.

The school of Beccaria in the field of juridical principles, and

the school of Howard in that of disciplinary prison rules, both caused an abundant resistance to the legislative and administrative horrors which were perpetrated from the Middle Ages down to the approach of the French Revolution. These common protests against the laws and prisons of the period were received with unanimous applause, and were carried in parallel directions by the tide of humanitarian sentiment to the point of exaggeration. The disciples of Beccaria, in studying crime in itself as an abstract juridical form detached from the actual world, where it is so deeply rooted, proposed as their aim (which they afterwards attained) the general diminution of the penalties prescribed by the codes and the suppression even of a great number of them, which were incompatible with the moral sense of modern peoples. The successors of Howard studied the prison system in and by itself, without concerning themselves about the world whence came the convict and where his victims remained. Their object was the betterment of prison life and they also were successful in accomplishing this.

It is time however to recall what they forgot, guided and animated as they were by sentimental aspirations which in truth are more effective than the counsels of calm reason. They were too exclusively preoccupied with the fate of the criminal after the commission of his crime and their attention and the solicitude of the philanthropic public were deflected from a much more considerable mass of unfortunates, who lead an unhappy existence in our midst, but who have a moral superiority over the delinquents in that they are honest and remain honest. The attention of legislators and philanthropists has hitherto been too exclusively directed to the individuals who by some degeneracy of their physical or psychical organization and under the action of a corrupt social medium have rebelled against external conditions with a malevolent and criminal activity, — while this same medium, this same want of education and moral training, this same misery pressing with equal weight on so many millions of men, has not driven them to robbery and homicide; nay, all the temptations, all the sufferings breaking against a well-tempered moral sentiment have at most incited in a few the sad protest of suicide. It is time, therefore, that the humanitarian sentiment of our epoch, which until now has often gone astray in showing an excessive solicitude for delinquents, or even in protecting animals with an unreasonable sensibility, should return to the great highway of

justice and truth. In this way, existing society will be able to fulfill its mission. It will no longer strive by the alms of the monks of the Middle Ages, nor by the violent denial of the laws of social evolution to comfort all this misery, which in countless forms obscures the luster of our civilization with so many shadows.

§ 5. The Positive Method.

This is why a new movement in criminal science has been forming for some years past. With respect to anthropology it was begun by Lombroso, and was immediately afterwards asserted on behalf of juridical sociology by a person whose name is immaterial and who, in a work published in 1878 (which perhaps bears evidence of immaturity), "announced his intention of applying the positive method to the science of criminal law." The development of the sociological side of the new researches was emphasized, and to this study the name of criminal sociology was given. At the same period, Garofalo was studying and developing preferentially those inductions of the new school which were more peculiarly legal. It is a law of the human mind that every innovation, in whatsoever class of facts, arouses the distrust of those who witness its first attempts. This conservative sentiment is not only legitimate but is necessary in the selection of ideas, provided, of course, that it does not go so far as to adopt the strange illusion of wishing to obstruct every further aspiration of progress. These aspirations are themselves legitimate and needful to the welfare of society whose life is precisely the product of these two opposed tendencies which aim at the same end. It is in this sense that Spencer said that all progress accomplished is an obstacle to future progress: for, every man who has consecrated his life to the realization of any reform or amelioration whatsoever, naturally falls into the illusion (from which only some specially favored minds escape) of believing that the last word in human progress has been said.

Each thinks that he has taken the last step, and the revolutionary of yesterday becomes the conservative of to-day. Thus it is that the person mentioned as having declared the necessity of renovating the criminal law has seen rain upon him charges of "scientific nihilism," of "neomania," and of "moral and social upheavals," and so on. Nevertheless that person, drawn by his studies into the realm of juridical research, did but collect

and coördinate ideas which were already broadcast in the other natural and psychological sciences. He only expressed a sentiment ripened by a long period of incubation, and already very active in the mind of the community, that there was disaccord between a mass of juridical abstractions and the palpitating realities of the Courts of Assize and other tribunals. He, I say, continued his study and perceiving in these very contradictions a psychological phenomenon which was natural and therefore inevitable, he permitted his ideas spontaneously to follow their evolution. Now, the idea maintained in the field of anthropology by Lombroso and by that same person in the field of legal sociology has spread with surprising rapidity, and both in Italy and abroad has found among jurists, naturalists, and sociologists an increasingly numerous and united phalanx of partisans. This has given it the right to declare itself henceforth as a new scientific school: and this school, notwithstanding some differences of opinion (unavoidable in the observation of natural phenomena, and consequently such as are found in all the positive sciences), has nevertheless a common method and direction, as well as a common source of ideas and aspirations.

This is due not so much to any special merit of its first promoters as to the fact that it needed nothing to develop and spread it but a candid declaration, since it was and is in the air that we breathe and since it was and still remains the last expression of a painful disagreement, evident from the beginning, between the mass of criminal theories and practical justice. The impotence of punishment to repress crimes, in spite of the prodigality of effort and expense that it has entailed, — the ever increasing number of habitual criminals, — the dangerous and sometimes absurd contrast between facts of psychiatry and the mystical theories of the moral responsibility of man, — the arrested development or exaggeration in the forms of procedure, — the introduction into this superannuated procedure of new institutions which do not fuse with it,[1] — all this, and still other reasons, demanded and still demand a scientific and legislative remedy. Such, then, is the cause for the new course of criminal law. And this new study, we may observe, makes no pretension to destroy all that has been done hitherto in either science or practice: on the contrary, it shows a progressive evolution

[1] *Cf. Escobeto,* "Il titolo per la costituzione di parte civile specie in rapporto ai sindacati professionali" (Città di Castello, 1912).

of this very same criminal science; it seeks to bring about a renovation in the supreme function of penal justice that will render it truly humane in the highest and most accurate sense. Above all, we must eliminate the incomplete idea expressed by certain eclectic jurists, and, at first by Lombroso himself,[1] that the new school is only a partial union and sympathetic alliance between penal law and criminal anthropology. It is something more than that with a much broader scientific and practical scope. It is the application of the experimental method to the study of crimes and punishments, bringing new life into the narrow field of abstract legal technicality through the discovery of new facts (revealed not only by criminal anthropology but also by statistics, by psychology, and sociology). It represents really a new phase in the evolution of criminal science.[2] In Italy, the positive method has long been followed, since it arose during the Renaissance from the labors of Galileo and his associates. The application of this method, quietly made in the different physical sciences, aroused a great deal of opposition when carried into the field of social and moral studies; and yet it is evident that if this method is so fruitful in some sciences, there is no reason why it should not be in all others. All sciences have a common foundation and an identical object: the study of nature and the discovery of her laws for the profit of humanity. Indeed, this is so true that, under the traditional "a priori" method, philosophy, as Spencer says, was only a succession of continual suicides, as each philosopher overturned the preceding system to build his own, destined in turn to be destroyed by its successor. With the experimental method, on the contrary, discoveries once made and verified stand forever, and are indestructible with respect to the facts from which they have been drawn. While in metaphysical philosophy, there is too often

[1] *Lombroso*, "Ueber den Ursprung, das Wesen und die Bestrebungen der neuen anthropologisch. Kriminalistischen Schule in Italien," in the "Zeitschrift für die ges. Strafrw.," 1881, I, 1.

[2] On this point see *Fioretti*, "Dernières publications des chefs d'école de la doctrine positiviste," in the "Rassegna Critica" (Naples, 1885), V, 2; and also "Polemique pour la défense de l'école criminelle positive," by *Lombroso, Ferri, Garofalo, Fioretti* (Bologne, 1886), pp. 215 *et seq.*

In the conclusion, after having shown the principal inductions of criminal sociology, I shall mention more particularly the opinions of Puglia, Liszt, Garraud, and others, who think that criminal sociology should remain distinct from criminal law in respect to technique, serving the latter as an auxiliary or complementary science, instead of being the broadest science of which law is only one chapter, — the juridical chapter.

absolute opposition between incompatible systems, sprung entirely from the logical phantasy of thinkers, in positive philosophy, there are only partial differences of personal interpretation, and the unity of common foundation as well as the unity of the facts observed remains.

But we find even here a psychological law which requires man to preoccupy himself with sciences which are the nearest, or which appear to be the nearest, to his own sentiments and personal interest, hence it was that when Galileo postulated the employment of the positive method in the physical sciences, there was little protestation or distrust, except on the part of those who found certain discoveries to be in opposition to their beliefs or their academic prejudices, and the interest of their caste. But on the whole, so long as this method was limited to the sciences which do not touch man himself, like astronomy, physics, chemistry, geology, botany, etc., it did not encounter much opposition. Later, in our own time, came Claude Bernard, who wished to apply this method to human physiology and to upset the old metaphysical imaginings, such as Vitalism. Once more murmurs arose but quiet was soon restored, because physiology seemed to have very little to do with the moral life of man. But the strife was indeed tumultuous when Comte in France, Spencer in England, Ardigo in Italy, and Wundt in Germany, sought to extend the positive method to the moral and psychological study of man. Customary and hereditary sentiments, religious beliefs, were thought particularly threatened by this attempt. Happily, common opinion, religion, and science develop in very different spheres. It is, however, true that as the domain of science enlarges, the narrower becomes that of the great common opinion and of religion; since, with the individual, as with humanity, intelligence and sentiment as a general rule advance inversely. At least, when the development of intelligence is uppermost, it dominates and transforms sentiment, if it does not stifle it. Indeed, if one wished to establish a sort of psychological scale of man, from the point of view of knowledge, one might say that there is first present in him the common observation of natural phenomena, unconnected and unrelated, and this is the lower degree beyond which comes science, which is only the coördinated and systematic observation of facts. And in the highest problems of life which science cannot solve, faith, due to the vague intuition of the unknown, governs. But psychology itself has now become

a positive science, the world is adaptable to it, and from it the new generations toil one after another to develop more and more the new life.

§ 6. The Positive Method and The Social Sciences.

When it was sought subsequently to apply the same positive method to the social sciences, and particularly to those which touch most closely everyday life, — that is, political economy and penal law, — the suspicions and resistance grew immeasurably, because there was seen in it a threat of an economic and juridical upheaval of society. Now when interests believe themselves in danger, they will not permit ideas peaceably to take their course and produce their beneficial effects. But what reason can there be to deny to the social and juridical sciences this extension of the positive method, which has already rendered such great service in all the other orders of science? Certainly none, at least for him who can raise himself to a high and serene outlook over the scientific evolution of our epoch. In fact, at every step in our day we meet examples of this continual extension of the positive method, founded upon observation and experience, to every branch of human knowledge.

Even outside of science, we witness at this moment a new movement in modern art, in which, always in the name of the method of observation, the study of truth and life is substituted for arbitrary romantic and academic types, and thus a progressive evolution is being accomplished which justly places the life of art in harmony with the rhythm of modern thought.[1] But to remain in the domain of science, there are other examples which fortify our opinion and support it on the indisputable authority of experience.

It is well known that until the beginning of the nineteenth century, and even later, practical medicine had always followed a method which was, so to speak, metaphysical and abstract. Medicine concerned itself only with nosology; that is to say, one studied, described, and treated diseases as abstract entities in an abstract fashion. The physician gave secondary consideration to the patient and was preoccupied solely in discovering the affection which altered health. If, for example, he was convinced that he had to do with a fever, with erysipelas, or with

[1] *Ferri*, "Les criminels dans l'art." French translation (Paris, F. Alcan, 2d ed. 1901).

pleurisy, he abstracted entirely from the patient, called in his knowledge of nosology and fought the fever, erysipelas, or pleurisy in itself, as if it were a real being. It made little difference whether the patient was of sanguine, lymphatic, or nervous temperament, or whether there were any antecedents, hereditary or personal, of dissipation or denutrition, or whether the external or internal cause of the organic disorder was this or that. Pleurisy was pleurisy, and as such it was fought. Subsequently a new tendency was introduced, consisting in the observation of facts. Then the point was reached of studying alone all the living person of the patient, his antecedents, habits, and organic manifestations. By the new processes, experimental in character, such as ascultation, percussion, temperature tests, the analysis of urine, and so on, medicine banished from its science and practice its former abstract tendency. The morbid entities were discarded and, instead of treating the *maladies*, the *patients* were treated; hence, to-day, the same disease may be treated by entirely different means, when the circumstances and the individual present different conditions. It is well known that Bufalini, in the field of theory, and Concato, Tommasi, and others, following the example of German medical men, were the standard bearers in Italy of the positive method in use at present, as Lombroso was among the first to borrow from the Germans and introduce to Italy the experimental method in psychiatry. Formerly, mental diseases also had been combated in themselves, as having their own existence, such as mania, melancholia, or dementia, but soon, in spite of resistance and ridicule (always inevitable at the beginning), alienists began to understand that the insane patient and not the insanity was to be treated, by employing all of the means which properly compose the arsenal of modern psychiatry.

§ 7. The Application of the Positive Method to Criminal Law.

Indeed, who does not see how much analogy there is between this happy and useful transformation in the medical sciences and that which the new school represents in criminal law, which indeed should be a social pathology and a clinic? Criminal law, also, has until now consisted in the study of crimes considered as abstract entities. Until now the criminologist has studied robbery, homicide, and forgery, in and for themselves, as "juridical entities," — as abstractions. He studied them with the sole aid of abstract logic and sentiments suitable to an honest man, which were

wrongfully believed to be imputable to criminals For each crime (as the result of a calculation, which several of the best-advised criminologists proclaim a scientific impossibility) there has been established a punishment fixed in advance, in the same way that a remedy was determined in advance, strictly prescribed and dosed for each disease. To the classical criminologist, the person of the criminal is an entirely secondary element, as the patient formerly was to the physician: he is only a subject to whom theoretical formulæ, theoretically conceived, are applied; he is an animated manikin, on the back of which the judge places the number of a section of the penal code, and the prisoner himself becomes a number by the execution of the sentence. The criminologist, like the physician of the old school, was, of course, obliged in spite of all, to consider the transgressor, by reason of certain personal conditions, too evident to be neglected, which modified, it was claimed, the moral responsibility of the man.

With respect to all else — organic and psychic conditions surrounding the delinquent, except for a small number of manifest circumstances, expressly enumerated (minority, deaf-mutism, insanity, intoxication, uncontrollable outbreak of passion) influences of heredity and family, conditions of physical and social environment, which constitute the inseparable antecedents of the person of the criminal, and consequently of his acts — to these the criminologist remained an entire stranger. He was concerned with the crime and not with the criminal, and conducted himself exactly in the manner of the physicians of the past. I do not maintain that all this study of crime in itself, considered as a juridical being, has been futile; nor do I contend that medicine, even after its transformation, has not derived some advantage from the nosological studies of former days; but I do maintain that this abstract study of crime, considered independently of the person of the delinquent, does not suffice to-day. In consequence, one can understand the reason of this evolution in criminal science, wherein crime in itself assuredly continues to be studied, but only after first studying the criminal with the aid of all of the means which the positive method can properly afford us.[1]

[1] This is in reply to those critics, who, taking refuge in the convenient system of falsifying the ideas of their adversaries to obtain an easy and unimportant victory, reproach the new school with wanting to *substitute* the study of the criminal for that of crime. We only say that before studying crime as a juridical fact, it should be studied as a natural and social phenomenon, and in consequence we must *first* study the person who commits crime and the medium in which he com-

§ 8. The Failure of Classical Criminology.

Only ask the criminologist why, for example, according to his science, every year there are committed in Italy three or four thousand homicides, while there are less in other countries with greater population; or how it happens that while no year is ever free from homicides there are not four hundred thousand; or what according to his science can be the proper remedies to suppress, or at least retard the increase of homicides. Ask this, I say, of a classical criminologist and he can make you no answer, because his science has not contemplated these problems, or has given them only an indirect response, as ready as it is unscientific. It advances as an implicit postulate that the commission of crimes depends on the free will of men to commit them or not — to commit them in one way or in another — or to commit them in greater or less numbers. This is how any further study of the natural causes of this social phenomenon is atrophied. The classical criminologist, however, is able to say when a crime is attempted, fails, or is accomplished — whether aggravated or whether there is extenuation; and this knowledge will also in the end be useful to us. But, in the meantime, he stands mute before the most urgent problems of which modern society demands a practical and effective solution. If it be answered that criminal science has given punishments as a remedy for crime, we in turn may observe that these punishments in every system of reclusion have so far fallen short of the object sought and the results hoped for, that we actually see again in this the most urgent necessity of facing what Holtzendorff, himself a classical criminologist, calls "the bankruptcy of the existing penal system." And it could not be otherwise under the "a priori" method which makes punishment the conclusion of an abstract syllogism and not that of the positive study of facts.

Until now the criminologist has closeted himself in the conscience of the honest man from the height of which he has judged and regulated the world of delinquents, starting with the idea that they are all men like himself. He has established

mits it and *afterwards* study juridically the crime committed, not as an isolated being existing in itself but as an index of the organic and psychic temperament of its author. Thus, as positive medicine studies disease in the sick person, so the criminal sociologist *must study crime in the criminal.* See *Ferri*, "Uno spiritista del diritto penale," in "Archiva del diritto psichico," VIII, 1 and 2, and in the "Studi della criminalità ed altri saggi" (Turin, Bocca, 1901).

the "a priori" principle: man by nature tends to good, and if he does evil it is by ignorance or wickedness and by a free determination of his will. He logically deduces the consequence that the evil inclination of the will must be met with a psychological obstacle, which, presenting a painful character on the one hand tends to restrain the man animated with an evil intent, and presenting the character of a legal sanction on the other hand serves to "reassert the right violated by the crime." On the surface the reasoning is quite logical: but it does not respond to the facts which, whether observed in prisons, insane asylums, or elsewhere, tell a different story; namely, that there are many men who have no repugnance for what honest people call evil or crime; who see in robbery only a trade which has its dangers (prison) like other professions; who look upon homicide not as a crime but as the exercise of a right, or at least as an unimportant act. And we ourselves have heard such declarations made by convicts in prison, who would have every reason to show repentance, but who, far from it, proclaim boldly that, given their liberty, they would immediately resume a career of robbery or kill the witnesses who testified against them or the victim who escaped them. Of course, all delinquents are not of that kind.

In any event the fact remains that men who are not insane, in the medical sense of the word, think and feel in a way directly opposed to that assumed by the criminologists who naturally feel and think as honest men and have no idea that one may think and feel otherwise. These same delinquents will tell you that to them punishment is simply a professional inconvenience, like a fall from a roof for a roofer, or the explosion of fire-damp for the miner; they will add that they often "get away with it" successfully; and conclude that even if caught and punished (which they rarely are, because of every hundred criminals thirty remain unknown and thirty others, unpunished), two months, a year, or five years of prison is not so great a misfortune. The facts do not confirm the idea which the honest man forms of imprisonment, since in his eyes it means both suffering and disgrace, whereas, up to the present time many delinquents see in it only a means of finding themselves in the company of a lot of comrades and of living at the expense of the State.

In practical medicine, when experience demonstrates that a certain remedy, formerly thought effective, proves non-effective, it is abandoned for others; so in like manner in the science which

rules the sovereign function by which society protects itself against crime, if the punishments hitherto in use do not attain their object, they should be abandoned for other remedies which shall not differ merely in appearance, form, or name, but which shall be less illusory, less stupid, less expensive, and finally, more humane for the convict as well as for society at which he strikes. What occurs in the actual practice is that after the commission of the crime, the criminal if he should be discovered (which is far from always being the case), is put in prison and there, usually unemployed, charges the taxpayers with a new burden to maintain him in an idleness which brutalizes him, ruins his health, and makes him less fitted for social life. But as new and more efficient remedies can not be invented by means of abstraction and syllogism, they must be found by positive research, that is, by the new method which alone has made criminal science a true social and positive science.[1]

§ 9. The Positive Method in Political Economy.

There is another very eloquent example, even more nearly related to the juridical sciences, which also confirms by anticipation the opportunity and the utility of the principles which we would apply: it is the example offered by Political Economy. Adam Smith may be said to have done for political economy what César Beccaria did for criminal law. They inaugurated two great and glorious scientific currents, similar in their noble spirit of reaction against the empiricism of the Middle Ages. Each raised the banner of individualism, the former in preaching free competition, the latter in defending the rights of humanity against the tyranny of the State in the field of criminal law. Both of these classic schools conferred great blessings on humanity, but each, to-day, has finished its glorious course. They attained and, it may be, exceeded their purpose.

Adam Smith and his school, using the "a priori" method, studied economic phenomena — consumption, production, and distribution of wealth — as abstract beings unvarying at all times and in all places. They formulated laws which they declared universal, absolute, and immutable. They started with

[1] I say once for all that if we call our school "positive" it is not because it follows a philosophical *system*, more or less like that of Comte, but only because of the *method* (observation and experiment) which we propose to apply.

See *Schinz*. "Le positivism est une méthode et non un système," in the "Revue philosophique," January, 1899, p. 63.

one great principle: *Man always seeks happiness* and from logical deduction they derived the ultimate consequences — general laws. But for a number of years, at first in Germany and then elsewhere, a heterodox movement arose in the science of political economy. This gave birth to the realistic, historical, or positive school. It, too, has had some famous representatives, whom the Prussian deputy Oppenheim called *State Socialists*. Cusumano twenty years ago introduced the doctrine in Italy with much enthusiasm. This new evolution has now spread everywhere, as Laveleye [1] and others bear witness, and has found complete expression in the socialistic doctrines which Marx had even earlier outlined with a strict and vigorous positivist method. Now, who does not see the positive direction of economic science? In it is proclaimed the necessity of regarding economic facts no longer in an abstract way, but as they actually occur, in such and such conditions of time and place, in order to deduce from them historical laws valuable for a given country, at a given period of time and not for other countries and other epochs. This is a direction that leads by an inexorable logic to positive and scientific socialism which is economic "transformism."

Who does not see, I say, that this direction is perfectly analogous to that which the positive school foreshadows and which it has already begun to apply in the penal and criminal sciences? [2]

[1] *Laveleye*, "Le socialisme contemporain" (4th ed. Paris, 1888); *Lampertico*, "Economia dei popoli e degli stati," vol. I (Milan, 1879); *Rae*, "Socialismo contemporaneo," Italian translation by *Bertolini* (2d ed. Florence, 1895), Chap. XI.

The reproach which *Durckheim* in "Les règles de la méthode sociologique" (Paris, 1895, p. 31) makes to political economy, that it has not positive realities but "pure conceptions of the mind," as the content and object of its studies is accurate in respect to the classical school of political economy. But scientific socialism — in the same way as this happened in the case of the positive and classical criminal schools — has really applied the rule of method which Durckheim rightly extends to all sociology: that is to say, we must "consider social facts as things"; or, to put it another way, we must consider them in their objectivity and in their conditions of time and place.

[2] For the inevitable necessity for sociology to reach its logical conclusion in socialism and on the fundamental agreement of socialism (as it was constituted by Marx in the first place) with the evolutionary movement of modern thought (as disciplined by Darwin and Spencer) see my work, "Sociologia e scienza positiva" (2d ed. Palermo, Sandron, 1899). See also my communication, entitled "Sociologie et socialisme," to the First International Congress of Sociology at Paris (1894), in the "Annales de l'Institut internationale de Sociologie" (Paris, 1895), I. p. 157, where I concluded by giving the first expression to a statement which raised a great uproar more or less apparent or sincere among the neutral and undecided and professional sociologists but which proves itself more every day, viz.: Sociology will be socialistic or it will not exist.

And further, who, comparing the fact of the new tendency of criminology with analogous facts occuring in art and science, does not see that one has a new and singularly eloquent proof of its historical opportunity and practical utility? Again, all of this only confirms once more an idea solidly established in the history of humanity — that no phenomenon is miraculous or arbitrary, but that everything occurs as it should occur, since a fact is but the natural effect of determining causes. Consequently, if this progressive movement in criminal science is ever increasingly seen, in our time, it would be a strange aberration to impute it to the personal caprice of any individual instead of recognizing in it the necessary and unavoidable manifestation of a certain historical condition of science as the reflection of social life. I was, therefore, right in asserting that our school is not a partial union, more or less organic — a more or less transitory sympathetic alliance of criminal law with the anthropological and social sciences — but is one of the numerous and happy applications of the positive method of the study of social facts and, in this regard, is an ulterior development of the classical school founded by Beccaria.

§ 10. Programme of the New School

Indeed, if the school founded by Beccaria sought and obtained in practice a diminution of penalties and in theory the abstract study of crime considered as a juridical entity, the new school in turn seeks a double and fruitful aim. In practice, its proposed object is the diminution of crimes, which always increase rather than diminish; and in theory, in order to secure this practical object it proposes the complete study of crime, not as a juridical abstraction, but as a human act, as a natural and social fact: consequently it undertakes to study not only crime in itself as a juridical relation, but also, and in the first place, to study him who commits the crime, that is, the delinquent. And as medicine teaches us that to discover the remedies for a disease we must first seek and discover the causes, so criminal science in the new

This declaration had been preceded by another in my work "Sociologaie criminalità," 1883, on the need for empiric socialism to submit itself to the discipline of sociological teachings, and this is clearly demonstrated by the scientific direction which Marx and Engels have given to socialism.

On this agreement between science and life in socialist doctrine, see my inaugural discourse at l'Université nouvelle of Brussels: "La science et la vie au XIX^{e} siècle."

form which it is beginning to assume, seeks the natural causes of the phenomenon of social pathology which we call crime: it thus puts itself in the way to discover effective remedies which may not indeed eliminate it (because there are in nature anomalies that may be lessened without being capable of destruction), but which may repress it within certain bounds. Nor is this all. As we have seen the classical school rise in the name of individualism to vindicate the rights suppressed by the State during the Middle Ages,[1] so the positive school now limits the sometimes excessive predominance of individualism and re-establishes the equilibrium between the social and individual elements.

This characteristic of the new school of criminal law is common to all the other juridical and social sciences, especially political economy; since political economy (although it does not lack the intellectual courage to reach the socialistic conclusion) shows in the most striking manner a scientific tendency to temper an exaggerated and metaphysical individualism by the introduction of the social element in a juster proportion. This is fully in accord with the great law of action and reaction which dominates the physical as well as the moral world — a law by which a force, over-developed in a given direction, ends by inciting an inverse reaction, which in turn always reaches a point beyond the proper limit; and it is only after these opposite movements have reached their extremes that a mean and definite current for each historical movement is produced and itself becomes the origin of an uninterrupted succession of rhythms of action and reaction. From this flows the immediate consequence that, in the order of theory, we accept willingly and gratefully all that has been accomplished thus far by the classical schools in the juridical study of crime, reserving to ourselves, it is needless to say, the undeniable right of modifying ideas which the progress of the natural sciences has shown to be out of harmony with the reality of facts. We acknowledge that without the glorious labors of our predecessors we ourselves could have made no progress. This is agreeable to the universal law of evolution by which, as Leibnitz said, the

[1] *Puglia*, "L'évolution historique et scientifique du droit et de la procédure pénale" (Messina, 1882); *Worms*, "Les théories modernes de la criminalité" (Paris, 1814); *Prins*, "Causerie sur les doctrines nouvelles de droit pénal" (Brussels, 1896); *Marcuse*, "Strafrecht und sociale Auslese," in the "Centralblatt fur Nervenheilkeit und Psychiatrie," August, 1897; *Caignard de Mailly* "L'évolution de l'idée criminaliste au XIX^{e} siècle" (Paris, 1898) (extrait de la Réforme Sociale).

present is the child of the past but father to the future.[1] Such being the origin and viewpoint of the positive school of criminal and penal law, the attacks which the birth of this scientific movement called forth from both theorists and practitioners can be explained only as habitual prejudices — as the repugnance which is ordinarily aroused by every innovation and which Lombroso called "Misonéism."

It has been charged that, in the matter of penal law, we tend towards "complete nihilism," merely because we have said that the existing science often does not rest upon positive foundations, and hence as astronomy is derived from astrology, chemistry from alchemy, psychiatry from demonology, and so on — we believe that a body of doctrine more positive and more useful to society will in like manner spring from the existing penology, so illusory in practice. Our accusers did not perceive the signification of the new school; that it came to rejuvenate and vivify, through experimental studies, the true and imperishable part of criminal law, compensating by this inestimable benefit, the loss of leaves and branches withered by metaphysics. It is a law in nature, that everything progresses by degrees, and thus criminal science, like every living organism, proposes in its progress not the destruction of all that has heretofore been done in the strictly juridical field but seeks only to amputate the dead limbs and to stimulate the ulterior evolution of those germs which the criminologists have been unable to develop, absorbed as they were in their historic mission, and too often misled by a method which was always unproductive.

[1] To be just and to show how the ideas of the positive school already existed not only dimly in the general conscience, but clearly expressed by a few thinkers and that they only awaited, in order to develop and assert themselves, favorable conditions of the scientific and social medium such as I have indicated above, I recall some observations of *Gall*, "Sur les fonctions du cerveau" (Paris, 1825), where he displayed extraordinary foresight — "Crimes cannot commit themselves; hence they cannot be considered as abstract beings. *Crimes are produced by individuals who act; therefore they receive their character from the nature and the condition of these individuals* and one can only understand them according to the nature and condition of these same individuals" (I, 358). — "Crimes have been considered in themselves as abstractions from their author. To change the will of wrong-doers, *it has been thought sufficient to inflict punishment on them*" (I, 339). — "The object of legislation should be as much as the nature of man permits to *prevent* the crimes, to *correct* the wrong-doers, and to place society *in safety* against those who are incorrigible" (I, 339).

For a hundred years no advance of a single step was made beyond these fruitful ideas entertained by Gall — of them Romagnosi and Carlo Cattaneo had an intuition in the domain of sociology but only in our time has criminal sociology scientifically and practically put them in a clear light!

§ 11. Eclecticism.

Since the advance of science traverses periods of action and reaction and since every current in a given direction after it has reached its maximum, induces an opposite current which by reaction reaches the opposite extreme until the resultant which lies between the two is established, there is, so to speak, a natural eclecticism. But those who are between the classical school and the positive school, and who have not taken sides with one or the other, and who have proclaimed an "alliance" between the anthropological and penal sciences, do not belong to this natural eclecticism. As penal science has actually witnessed the complete development of the classical school and the beginnings of the positive school, eclecticism can be only "a priori" since it assumes to determine the resultant of two currents of which the last is far from having reached its full expansion: it should be, therefore, and in fact is, arbitrary and provisional since the resultant must be displaced with each further development of the new scientific current. Moreover, if eclecticism appears after the two currents have accomplished their cycle, it is perfectly futile for studious men to excite themselves in determining a resultant which determines itself better and with greater nicety by a purely natural effort. Hence, to pretend to fix this natural resultant, from now on, by eclectic exchanges is simply a fruitless and vain task, even should it not merit the ridicule of what I have called "the expectative method," wherein the positive examination of crimes and delinquents is actively pursued but only "provisionally" in respect of the dominant criminal theories, that is to say, those theories which everyday facts show us are not in accord with reality.[1] Further, in science as in life, reality goes beyond the idea of which it is the manifestation: everybody knows that revolutionists bring about reforms; that reformers maintain the

[1] *Ferri*, "Uno spiritista del diritto penale," in the "Archiva di psichica," VIII, 1–2, and "Studi sulla criminalità ed altri saggi." (Bocca, Torino, 1901.) This judgment which I gave of eclecticism and in which many persons, it will be readily understood, found "a very marked bitterness," is in perfect agreement with that of Loria in an article on the "middle ideas" where he says that if their history were possible it "would be at all events only the history of mediocrity, of timidity and hybridism; it would be a document of human shame and humiliation; while only the history of the extreme ideas could be the epic of divining mind, the immortal crown placed by history on the brow of humanity and finally the apotheosis of that thoughtful and perplexed Ahasuerus who for so many centuries has unceasingly marched across the sad regions of thought." "Rivista di sociologia," February, 1895, p. 107.

"statu quo"; and that conservatives make concessions. Hence it is, that in order to obtain effective reforms, it suffices in the abstract to be a reformer, but one must in reality be a revolutionary.

To sum up what I have said, eclecticism must be a natural resultant; and no one should be an eclectic since useful eclecticism operates by itself alone. And, yet, there are eclectics because "natura non facit saltus"; because in science as in life courageous and consequential souls always must associate with men of mediocrity; and because when the initiative has been taken in any new scientific direction, it is very easy and very convenient for intellectual parasites to follow the lead and assume the air of innovators. I will not say, as has been said of hypocrites, that their existence is an homage to truth. I will say, however, that it is an effect and recognition of new doctrines. In fact, in the present debate between the two criminal schools, not only the pure classicists make concessions (Carrara alone having remained irreconcilable, because he was fully aware that one stone removed from the metaphysical systems would bring down the whole edifice) but even the less ancient criminologists or neoclassicists, as they have been called, freely invoke a marriage of convenience between the old penal law and the young positive science. They always forget that the new school stands for a complete innovation in scientific method, and that there is no middle term; either one syllogizes on crime considered as an abstract juridical being or one studies it as a natural phenomenon. Once concede this innovation in method and all the rest comes irresistably, imposed by the observation of facts. This is so true that with our eclectics everything may be reduced to making the man who commits the crime and the natural factors of crime figure in the preliminary chapter, as a somnolent and conventional group of "auxiliary sciences" of penal law and thereafter to follow in the ruts of the old juridical syllogisms without demanding of these auxiliary sciences the facts which should serve as the basis of general inductions. This, for an example among the moderns, is the procedure of Liszt and Garraud in their treatises on criminal law.[1]

§ 12. The Third School.

There has been observed in Italy the birth of a third school which makes claims that it is based upon these three "funda-

[1] *Liszt*, "Lehrbuch des deutschen Strafrechts" (8th ed. Berlin, 1897); *Garraud*, "Traité de droit pénal français" (Paris, 1888-94), 5 vols.

mental points; (I) respect for the personality of civil penal law, in its scientific renovation; (II) the causality and not the fatality of crime and, consequently, the "exclusion of the anthropological criminal type"; (III) social reform as the duty of the State, in the fight against crime.[1]

However, this school, as I unhesitatingly predicted in the third edition of the present work (1892), could not live and prosper simply because it is based on no sufficient reason. One cannot believe that mere disagreements of personal views are sufficient to make a school or a scientific movement. If such were the fact, instead of one classical criminal school, we would have at least a dozen, as we would find at least that many groups of criminologists with ideas differing on particular points. For example, take the fundamental reason for the right to punish: on this point Berner has distinguished as many as fifteen theories which he classifies as "absolute," "relative," and "mixed."[2] These personal differences occur even more readily in the positive theory because of the greater diversity in the personal observation of positive facts. Nor is it any the less evident because the classical school and the positive school each forms an organic whole characterized by the unity of its method and its general conclusions. This is so manifest that Tarde himself, — a so-called eclectic, and a disguised spiritualist, as he showed more and more by his later unconvincing volumes on "social logic" and "universal opposition" after I gave a scientific diagnosis of his previous labors, — speaking of the two chiefs and the common soldiers of the "third school" at a time when it was still in process of gestation, paternally advised them "not to retard themselves with *useless* polemics on whether there really is a third school unfolding itself on the fertile soil of Italy";[3] and I, for my part added that to make a third school it was not enough, for example, "to attack the Michel Angelo statues sculptured by Lombroso and to rescratch them in a few places with the syllogistic file by the aid of a magnifying glass.[4] Aside from Fletscher's accurate remark that[5] the positive

[1] *Carnevale*, "Una terza scuola di diritto penale in Italia," in the "Rivista carceraria," July, 1891; "La nuova tendenza nelle discipline criminali," in the "Antologia giuridica," 1892, part 8; *Almena*, "Naturalismo critico e diritto penale" (Rome, 1892), "La scuola critica di diritto penale" (Naples, 1894).

[2] *Berner*, "Trattato di diritto penale, "Italian translation by *Bertola* (Milan, 1887), pp. 6–31. And it is about the same in all the classical treatises on penal law.

[3] *Tarde*, in the "Archives d' anthropologie criminelle," 15 March, 1892.

[4] *Ferri*, "Intelligenza e moralità della folla." — Controversy with Sighele in the "Scuola positiva," Sept. 1894, p. 729.

[5] *Fletscher*, "The New School of Criminal Anthropology" (Washington, 1891).

school stands between the spiritualistic thesis (which centers the whole origin of crime in the mathematical point of free will) and the primitive thesis of sentimental socialism (which traces the origin of crime exclusively to suffering), — whereas the socialists after my work on "Socialism and Positive Science" were willing to concede that even were suffering once suppressed there would still be sporadic forms of crime due to unavoidable influences, pathological, traumatic, etc., — Van Hamel said of the pretended "middle school," which rests on the importance given to social factors in the genesis of crime (as if the positive criminal school had not placed these factors in a strong light from its beginning with the first edition of this work): "A separate school is not based on sufficient reason, because every movement will remain sterile which does not approach the point of departure of the Italian school, that is to say, the etiological study of the delinquent and the three orders of individual, physical, and social factors in crime." [1] In thought and in intellectual labor there are but two great highways: either "a priori" deduction, or positive induction; it being of course understood that the deductive method does not absolutely exclude all induction in the "a priori," and vice versa, since it is only a question of predominance.

In addition to these two great highways there may be paths, but not a third highway. Thus the classical school has its *irregulars*, as the positive school, too, has and will have them. Hence these three schismatic points, which should, it is claimed, justify a third school, are secondary or inexact. In the first place, preoccupation with the personality of the penal law is purely a scholastic question: whether penal law be called criminology or criminal sociology, it all turns about the study of crime as a natural and social phenomenon and the method and measures to be employed in the preservation of society from it. All else is but academic futility and I will discuss it in the conclusion of this work.[2] The word "penalty" a few hundred years ago meant compensation; in the classical school it means punishment and pain (and on this Carnevale insisted); in the positive school it means repressive and preventive defense. The second point is an equivocation: none of us speak of the fatalism of crime but always of causal or natural determinism; and this is so obvious that Lombroso, who

[1] *Van Hamel* "Der tegen Wordige Beweging op triet gebied. van het Strafrecht" (Amsterdam, 1891), and in the "Scuola postiva," 1891, p. 46 and 144.
[2] *Post.*

has been oftenest accused of biological fatalism, cited the case of the born delinquent who, thanks to favorable surroundings, commits no crime. In fact, in the third volume of the last edition of "L'uomo delinquente" he indicates the means to prevent and cure the social malady which engenders crime. Finally, the third point is absolutely without justification if the positive school was the first to systematize not only the four classes of preventive means against crime but also the theory of social prevention (equivalents for penalties) by insisting on the notorious inefficiency of punishment in the fight on crime and in proclaiming that social evils, as we shall see later, require social remedies.

§ 13. The Positive Criminal School Is in Its Third Period.

The positive criminal school is now passing through the third period, that which in the evolution of every new science precedes definitive triumph. All innovations necessarily pass through the same phases. At first ignored because their dawn is confused with the last twilight rays of the ruling traditional theories, then scoffed at by the profane, as is everything which startles the mental habits of the multitude, they seem to be smothered under the Olympian silence of the pontiffs of orthodox and official science. This is the period of their trial; since the attempted innovations are either incapable of life and succumb during this phase of popular contempt and academic disdain, or are really endowed with vitality and in spite of the unintelligent judgments of the distracted mob, or the misrepresentations of disloyal opponents, succeed in forcing themselves on the attention of the public and become recognized by science, through repeated proofs of positive studies. In their fight for existence ideas know no quarter. Each day, with greater ardor, they are carried from the limited field of schools and books to the vast and tumultuous amphitheater of daily life, into discussion and judicial and administrative application. There, they must above all conquer the law of inertia, mental habit, and misoneism. These again, and more rigorously, test their scientific and practical vitality. The results of this conflict, however, alike in science and in life, are compromises, hybrid intermixtures, drifts of eclecticism, grafts of positive conclusions on "a priori" premises, and which often bring confusion and sometimes scandal into the sanctuary of the courts. But one clearly sees that this is only the prelude to the last phase where the new ideas, strengthened by the test, emerge

from it victorious, corrected and perfected. Founded upon that part of positive truth which even the traditional theories contained, they are grasped by popular thought and become the dominant ideas for new generations. They are, in turn, transformed into traditions, mental habits, and social institutions and prepare themselves for the inevitable struggles against other ideas which the future will bring forth, the ever new conquests of science over the unknown, by which humanity advances along the difficult and arduous road of civilization.

§ 14. The International Congresses of Criminal Anthropology.

The history of the successive international congresses of criminal anthropology held in late years proves most eloquently the triumphant vitality of the new scientific current. The second congress was held at Paris in 1889, and our French colleagues (Tarde, Lacassagne, Manouvrier, Topinard, and others) took advantage of it to enter into the first skirmishes with the school which is known abroad as the "New Italian School": it was defended by Lombroso, Ferri, Garofalo, Pugliese, Olivieri, Laschi, Drill, Van Hamel, Samal, Detcherew, Moleschott, and Clémence Royer. As the most animated discussions dealt with the famous "criminal type," [1] the congress unanimously approved the proposal of Garofalo and named an international commission (Lombroso, Lacassagne, Benedickt, Bertillon, Manouvrier, Magnan, and Lemal) instructed "to make a series of comparative observations, the results to be presented to the next congress, on at least a hundred living criminals and a hundred honest men of known personal and hereditary antecedents. This was really a positive means for the solution of the difficulty. But the committee never met, and one of its members, Manouvrier, published a memoir to demonstrate that such a comparison was impossible, as if the criminal anthropologists in Italy and elsewhere were not making it every day by strictly scientific methods, controlled and confirmed in every part.

Just prior to the third congress, at Brussels in 1892, the Italian criminal anthropologists and sociologists in a letter signed by forty-nine of them,[2] declined to take part in the congress unless the data of facts which the international commission ought to have presented, and on which it would have been possible to attempt a positive and decisive discussion, would be

[1] See Chap. II. post. [2] See "Scuola Positiva," May, 1892, p. 422.

produced. And their absence from this congress gave unbridled liberty to the most scathing and eloquent scoffings at the criminal type and criminal anthropology; and it was in vain that Van Hamel, Drill, and Mme. Tarnowski tried to stem the tide. The abuse continued in the newspapers and reviews of our opponents, who for two or three years split our heads with their triumphant refrain that "for the future the anthropologico-criminal school is dead and buried." But the school gave evidence of its movement and life, publishing volumes full of the results of experimental research, until the fifth international Congress at Geneva in 1896. It was opened by the President of the Swiss Confederation with an address in which, among other significant utterances, he said to the members: "The character of your work requires you to be endowed with the modern spirit. If one, not the least illustrious among you, has advanced beyond his times, he becomes a herald of the future; which will be his crowning glory in the eyes of posterity."[1] To end the complaints of our opponents the Italians took part in this Congress and obtained a splendid triumph for the "anthropologico-criminal school." Among other results obtained, they put an end to a mistaken idea, which had existed for a short time even in the native land of the school, and which persisted in other countries for a much longer period.[2] For a belief had become deep-rooted (and our classical and eclectic adversaries did their best to foster it) that the fundamental conclusion of the Italian school on the criminal type (that is to say on what in 1880 I called "delinquente nato," or born criminal, a name which has been adopted in popular language, thus, both proving its accuracy and the infiltration of these ideas into the public mind) was based entirely on anatomical data secured from the skulls of delinquents.

For many years some critics were really ignorant, and many more pretended to be ignorant, of the fact that the Italian school from its beginning (for instance, in the first edition of this book, which was published at Bologna in 1881) has studied crime not merely as a biological phenomenon but also as a social phenomenon, and that the criminal was always studied not merely as an individual personality but also as a social

[1] *Lachenal* in the "Actes du IV e Congrès d'Anthropologie criminelle" (Geneva, 1897), p. 173.

[2] This was largely due to the fact that *Lombroso's* "L'uomo delinquente" was the only foreign publication of the school until 1895, which lent a certain air of probability to the erroneous belief.

personality. But, as it is more difficult to pull a nail than to drive it, and as those who will not hear are as badly off as those who are really deaf, it was as vain, after the Congress of Brussels as after the Congress of Paris to declare and repeat that the question of a criminal type was improperly presented and mutilated if viewed from an exclusively anatomical standpoint. There were brilliant debates at the Congress of Geneva where, by these declarations of ours (already insistently reiterated by Lombroso and myself), an attempt was made to clear the field of the obstacles artfully accumulated by our adversaries and at the same time to impress upon public attention the conclusions of the positive criminal school in their true light. Indeed, we have always maintained that as every crime was the resultant of three orders of natural factors (anthropological, physical, and social), neither the family nor social life of the delinquent could explain the genesis of crime (the same opinion that was maintained in Italy as early as 1880 by Turati, Battaglia, and others), nor the anthropological conditions (that is, anatomical, physiological, and psychical) of the delinquent. But in every crime there intervenes the complex and decisive determinism of the anthropological constitution and the geographical and social medium, so that there are to be found, as I said at the Congress of Geneva, born criminals who are honest — in the eyes of the penal code. Thus, tuberculosis may not prove fatal and hereditary insanity may not develop if the victim has the good fortune to live in an environment and under circumstances which are exceptionally favorable. The opponents of the Italian school who had had the prudence to remain away from the Congress of Geneva, consoled and comforted themselves in the newspapers, like Joly (in the "Journal des Débats," 5 Sept., 1896, to which I replied in the number of Sept. 20) or Tarde (in the "Archives" de Lacassagne) by saying that the declarations of Lombroso and my own at that congress had belied our earlier conclusions. But the truth is that only the conclusions that our adversaries cunningly imputed to us were belied and unmasked. The positive school has followed its own evolution, since, in its first phase, when the biological researches of Lombroso most attracted public attention, my sociological observations and those of others occupied a secondary place; while in a later phase, the influence of sociological factors has been less eclipsed by the brilliancy of anthropological proofs. This has been accurately pointed out by Florian

and Kurella.[1] But the truth is, that from the beginning of the positive criminal school, researches in biology and sociology have always formed its substance and its method. This is so obvious that even in the first Congress, at Rome in 1885, the programme of discussions was distinct in the two fundamental sections: criminal biology and criminal sociology; and the same is true of the second Congress at Paris in 1889, where one of the theses which I presented bore directly "On the relative value of the individual, physical, and social conditions which determine crime." Thus the first Congress at Geneva, and then afterwards in a decisive manner the fourth Congress at Amsterdam, in 1901,[2] definitely established the essential lines of the new scientific movement on crimes and delinquents in accordance with the inductions of the

[1] *Florian*, "La Scuola criminale positiva in Germania" (Kurella, Baer, Naecke, Vargha), in the "Scuola positiva," June, 1896; *Kurella*, "Die Kriminal. Anthropologie und ihre neueste Entwicklung," in the "Neue Deutsche Rundschau," August, 1898; *Gauthier*, "À propos du 4e Congrès d'Anthropologie Criminelle," in the "Schweizerische Zeitschrift für Strafrecht," 1896, p. 247. And for more details, *E. Ferri*, "Il congresso d'anthropologia criminale," at Geneva, in the "Scuola positiva," September, 1896, in the "Revue Scientifique," Nov. 7, 1896, and in the "Centralblatt für Nervenheilkunde und Psychologie," Nov., 1896.

[2] Still, at the Congress of Amsterdam, Crocq and Garnier again raised the question of the born criminal and afforded me occasion to repeat for the thousandth time the history of this famous scientific misunderstanding. And the congress in the end remained convinced that for twenty years we have believed that the *born criminal* means "the man predisposed to crime, but who will not commit crime until his physio-psychic predisposition becomes fixed by the conditions of the mundane and social medium." But to prove that the deaf are no worse than those who will not hear and that certain persons are incorrigible, it suffices to recall a few lamentable episodes. The "Rivista penale," as after the Congress of Geneva (Nov., 1896), again boldly declared after the Congress of Amsterdam (Oct., 1901) that Criminal Anthropology was for the future dead and buried, so manifestly in the interval between the first and second congresses it must have come to life. But Gauckler showed himself even more deaf ("Revue pénitentiare," Sept.–Dec., 1901) when he said that my declarations at Amsterdam, intended like those made at Geneva, to dispel the misunderstanding in the minds of persons in good faith, were not in agreement with the "pure Lombrosian school." I was then obliged, for the thousand and first time, to repeat in my account of the Congress of Amsterdam, the history that I repeat here, as in all my Italian editions. Nor is this all: Tarde, once again in the same "Revue pénitentiare" has exhibited a curious but not rare phenomenon; being little advanced himself in studies of criminality, he thought it was criminal anthropology which stood still and said that it "marked time on one spot." But it suffices to run through the solid 394 pages of the account of the labors of the Amsterdam Congress to recognize that, aside from unavoidable repetitions, necessary for scientific propaganda, there is there contained a mass of new data confirming and developing the positive inductions. This explains how the press of every country in the world spoke of this congress as a triumph for criminal anthropology, and how, in homage to the positive school, Turin, where Lombroso is professor, was chosen as the place of meeting for the fifth international congress.

Italian school, as was loyally acknowledged by Gautier, an impartial foreign observer of the different schools and of the earlier congresses. The new scientific development was not only asserted and broadened in the international congresses "ad hoc" but it found and continues to find eloquent champions in the other scientific congresses, such as the Anthropological Congress of Paris in 1878,[1] and those more recently held at Antwerp,[2] Nancy,[3] Lemberg,[4] Toulouse,[5] Sienna,[6] Cologne,[7] Lisbon,[8] Weimar,[9] Edinboro,[10] Chicago,[11] Dresden,[12] Rome,[13] Paris,[14] Marienbad,[15]

[1] "Crânes et cerveaux de criminels," discussion by *Benedikt, Broca, Bordier, Dally Topinard,* in the "Comptes rendus du congrès anthropologic de Paris," 1880, pp. 141 *et seq.*

[2] *Benedikt,* "Des rapports entre la folie et la criminalité," address at the Congress of Phreniatry and Neuropathology at Antwerp, 1885; *Heger,* "La question de la criminalité au congrès d'Anvers" (Brussels, 1885).

[3] *De Mortillet,* "Anthropologie criminelle; la peine de mort et les autres peines au point de vue sociologique." Report to the *Association française pour l'avancement des sciences,* Nancy, 1886.

[4] At the Congress of Polish jurists (1887) Rosenblatt discussed "psychological motives in crimes"; O. Ersynnski discussed "the new anthropological school"; and Butzinski discussed "imprisonment and deportation according to the new ideas."

[5] *De Mortillet,* "La Pénalité au point de vue anthropologique et sociologique." "Report to *l'Association française, etc.*" Toulouse, 1887, in the "Revue de philosophie scientifique," Jan. 1888, p. 63.

[6] "Atti del V Congresso freniatrico â Siena," 1886 (Milan, 1887), Discussion on moral insanity and congenital delinquency.

[7] *Binzwanger,* "La dottrina della fisiologia e clinica psichiatrica in rapporto colle dottrine penali al congresso dei naturalisti tedeschi (Cologne, 1888), in the "Archiva de psychiatra," IX, 637.

[8] Among the subjects discussed note these: The necessity for reforming the penal codes to put them in harmony with psychology, criminal anthropology, and mental pathology; Reforms in the different system of penalties according to the anthropological categories of delinquents; Imprisonment of delinquents for an indeterminate time (in the "Revue d'anthropologie criminelle," Jan., 1889, p. 49).

[9] At the Congress of German medical alienists, Sept., 1891, the principal question was "Responsibility and Criminality"; the report was made by Pelman who emphasized especially the works of the positive criminal school.

[10] At the 1892 session of the "British Association for Advancement of Science," a special section was created for criminal anthropology.

[11] Among the many congresses which met at Chicago, in 1893, the one devoted to Moral and Social Reforms had a section for the prevention and repression of crime to which Lombroso, Ferri, and Garofalo were personally invited.

[12] At the Congress of German medical alienists, Sept., 1894, there was a discussion on Criminal Psychology between the Chairman Sommer and Doctors Kurella, Pelman, Nauke, and Leppmann.

[13] At the 11th "International Medical Congress" (Rome, 1894), a section of psychiatry, neuropathology, and criminal anthropology was presided over by Lombroso. There were discussions on the "Stigmata of degeneracy" (Naecke, Benedikt, Lombroso); on the "Brains of Criminals" (Mingazzini, Sergi, Penta,

New York,[1] Cassel,[2] Tunis,[3] Monaco,[4] Berne,[5] Moscow,[6] Saratoga,[7] Paris,[8] and Turin.[9] Without mentioning other

Kurella, Benedikt, Roncoroni); on the "Influence of sex in criminality" (Roncoroni); on the "Anomalies in the internal organs of degenerates" (Motta, Lombroso, Tonnini, Benedikt); on "Criminality and the economic factor" (Fornasari, Lombroso, Ferri); on the "Characteristics of delinquent murderers" (Ferri, Lombroso, Naecke, Kurella, Benedikt, Zuccarelli, Taverni); on the "Visual Field of Degenerates" (Ottolenghi); and on the "Clinical Diagnosis of a born-criminal" (Lombroso). See "Atti del XI Cong. Med. intern.," Rome, 1895, vol. IV.

[14] At the 1st Congress of the International Institute of Sociology (1894), there was a paper on "Justice and Darwinism," by *Novicow* and one on "Sociology and Penal Law," by *Dorado Montero;* at the 2d Congress there was a discussion on "Crime as a Social Phenomenon" (Tœnnies, Ferri, Garofalo, Tavares, de Madeiros, Puglia); and at the 5th Congress (1897), Dorado Montero, and Puglia spoke on "Penal Justice of the Future." See "Annales de l'Institut international de Sociologie," Paris, I, 1895; II, 1896; IV, 1898.

[15] In the session of 1895 of the German medical alienists, Pelman developed the subject " Science and Crime" according to the ideas of the positive school.

[1] In the Medico-Legal Congress of 1895 there was a section of "Criminal Sociology," and there were discussions on "Homicide-suicide" (Bœhm, Bach), on the "Etiology of Criminality" (Brower, Havelock Ellis); on "Sexual Perversion and Criminality" (Lee Howard); and on "Indeterminate sentences for born criminals" (Gordon, Battle). At the meeting at Chicago (1896) there were discussions on the "Reform of Penal Justice" (Austin, chairman); on the "Habitual delinquent" (MacCaughry); and on the "Treatment of habitual delinquents" (Pinkerton, Elliott).

[2] At the Anthropological Congress of Cassel (Aug. 1895) Buschau read a report on the "Gegenwärtige Standpunkt der Kriminal Anthropologie."

[3] At the Congress of the Association française pour le progrès des sciences in April, 1896, the "Influence of contact of two races and different civilizations on criminality" was discussed.

[4] At the 3d International Congress of Psychology (1896) there was a discussion on the "Relations of Psychology and Criminal Law."

[5] The meeting of Swiss jurists (1896) had the Penal law for its theme: "In what way should the Swiss Penal Code treat habitual criminals?"

[6] At the Twelfth International Congress of Medicine, Aug., 1898, there was a discussion on the "Existence of Criminality in the Sense Understood by the School of Lombroso," and that savant held an appreciated conference on the new conquests of psychiatry and criminal sociology.

[7] At the meeting of American Society of Social Sciences, Sept., 1897, Dr. Wey, of the Elmira Reformatory, spoke on the "Crimes of Minors," and Round treated the suggestive subject: "When shall we be able to Abolish Prisons?"

[8] At the meeting of the Association pour l'avancement des sciences (Paris, Sept., 1898) there was a discussion on the causes of the "Continual Increase of Crime and Suicide," on the "Relation between Alcoholism and Criminality," and on "Means Suggested for the Betterment of Convict Minors."

[9] At the 1st Italian Congress of Legal Medicine held at Turin (Oct., 1898) by the Italian Association of Legal Medicine (part of its programme being "to promote congresses which, in studying the multiple factors of crime, shall have especially in view the moral improvement of the social classes"), there was also a sect on of "Criminal Anthropology and Criminal Sociology," where there were discussions on "Murders committed through affection" (Tamburini); on "brigands,

researches in criminal anthropology made by the anthropological societies already in existence, such as the anthropological inquiry in the Belgium prisons[1] and the studies of skulls and brains of criminals by the societies of Lyons, Paris, etc., — there were also founded at Buenos Aires,[2] Petrograd,[3] Rio de Janeiro (1892), and St. Paul (1893) special anthropological criminal societies. In South Australia a society was started, evidently in accord with our theories of criminology (1897), which seeks to effect the abolition of capital punishment, inaugurate the practice of indeterminate sentences, and institutions similar to the Elmira Reformatory,[4] — an institution which it is to be hoped will finally be reproduced in Italy. Let us note also, among the museums due to private initiative, those established respectively by Lombroso at Turin, by Tenchini at Parma, by Ottolenghi at Siena, by Frigerio at Alexandria,[5] by Zuccarelli at Naples (with the school of criminal anthropology), by Macé[6] at Paris, by Lacassagne at Lyons, and that "central museum of criminal anthropology" which the first congress of criminal anthropology at Rome (1885) proposed, and which Beltrani Scalia, director general of prisons, organized a number of years ago. In fact, anatomists were commissioned to perform autopsies on the bodies of prisoners to gather craniological and anatomico-pathological data and thus prepare magnificent scientific material. Unfortunately, as usually happens in Italy, this excellent initiative brought no results in

(Penta); on "the criminal life at Rome" (Niceford); on "tattooing among minors undergoing correction" (Ottolenghi and de Blasio); on "latent delinquency" (Pinsero); on the "transformation of the prison into an agricultural colony" (Eula), etc.

[1] "Bulletin de la Société d'Anthropologie de Bruxelles," discussion of a project for anthropological investigations on delinquents by *Warnoys, Prins, Albrecht, Spehl, Heger, Houzé,* etc., 1885, II, 202; III, 3, p. 49; *Ramlot* and *Warnots,* "Sur quelques résultats de l'enquête de la prison cellulaire de Louvain," *ibid.,* III, 276 and 321.

[2] Through the initiative of Drago, there was instituted, in 1888, a "Societad de antropologia jurídica de Buenos Aires" to "study the person of the delinquent, indicate the dangers arising from him and the degree of his responsibility, in promoting, at the same time, the gradual and progressive reform of the penal law according to the principles of the new school." ("Archives de psychologie," 1888, IX, 335.)

[3] A Russian Society of Anthropology was founded in February, 1888, which has placed criminal man among its subjects of study. "Bulletin de la Société des prisons" (Paris, 1888).

[4] In the "Rivista carceraria," Oct., 1887, p. 622.

[5] See "Scuola positiva," Feb., 1893, p. 188.

[6] *Macé,* Mon musée criminel" (Paris, 1890).

official spheres,[1] although abroad, the rich collections of criminal photographs not only aided the police but served scientific research, as in Germany for instance, and even in Russia. Later, museums of criminal anthropology were begun: thus at Brussels under the ministry of Begerenz; at Gratz by the penal tribunal; [2] at Puebla by the State government; and finally at Lausanne by Professor Alfred Niceforo, who was brought there from Italy.

§ 15. The International Union of Criminal Law.

The positive criminal school with its tendency to seek practical applications, has also recently declared itself in another fashion by the International Union of Criminal Law, founded in 1889 by Liszt, Prins, and Van Hamel, which has now many hundreds of adherents. Unfortunately, notwithstanding the radically logical tendencies of Van Hamel, the organization lies befogged in eclecticism, exemplified particularly by Liszt and Prins, with the result that in the annual congresses the discussions and proposals have become less and less heterodox and radical: thus once more bearing witness of the hopeless sterility of "middle" ideas. In any event, as Frassati has said, "the origin of the International Union of Criminal Law [3] is incontestably due to the new school" so also, according to the statements of Liszt and Garraud, "the Italian school must be given the credit, denied it by some prejudiced minds, of having given a new aspect to criminal and penal law." [4]

§ 16. Practical Applications of the Positive School.

The new ideas have not been confined to purely scientific spheres: they have already begun to find more or less direct judicial recognition and are dominant in expert medico-legal science. Among the applications made by judicial criminal anthropology, one calls to mind the Bertillon method, which, adding

[1] The Congress of Legal Medicine at Turin (Oct., 1898) approved the proposal of Eula on the "Central Museum of Criminal Anthropology."

[2] *Gross*, "Das Kriminal Museum in Graz," in the "Zeitschrift für die gesammte Strafrechtswissenschaft, XVI, 1894, and in the "Scuola positiva," March, 1896, p. 191.

[3] *Frassati*, "La nuova scuola penale in Italia ed all'estero" (Turin, 1891), p. 477; *Stoos, Liszt, Lilienthal*, "Die internationale Kriminalistische Vereinigung und ihre Zielpunkte," in the "Zeitschrift für die gesammte Strafrechtswissenschaft" 1894, pp. 611 and 686.

[4] *Liszt*, "Lehrbuch des Deutschen Strafrechts," VIII ed., Berlin, 1897, pp. 50; *Garraud* in the "Revue pénitentiaire," July, 1897, p. 1169.

anthropometric data to the photographs of suspects and ex-convicts, permits a more easy personal identification of criminals. The Bertillon system was the first nucleus of the scientific police, brought to a high integral development by Ottolenghi, with tests and proofs strictly in accord with the premises of the positive school. Then came all the studies (Warner, Galton, Boas, Zuccarelli, Riccardi, Niceforo, Laschi, Miliarewsky, Marina) and the institutions (Medico-Pedagogical Institute of Petrograd directed by Miliarewsky, Elmira Reformatory, etc.) destined to establish scientific and practical relations of anthropology and psycho-pathology with pedagogy. Finally, in late years, the legislative activity in all that pertains to the habitual criminal, to the labor of convicts, to penitentiary systems, to public and private insane asylums, and to conditional liberation, conforms more and more to the rules, methods, and results of criminal anthropology and criminal sociology. Even the establishment of asylums for the criminal insane ("manicomes"), suspension of sentence for the occasional minor delinquents, reparation to the parties injured for the loss sustained, and the indeterminate sentences for criminals in whose case indemnity is insufficient, because of the seriousness of the act, and especially because of the personal conditions surrounding the wrongdoer[1] — all of this is a direct and specific application of the rules of the positive school. It should be remembered that the prison reforms accomplished in England — beginning with the appointment of Griffiths as inspector-general of prisons, who at the Geneva Congress (Aug., 1896) of criminal anthropology expressed his belief in the principal conclusions of the positive criminal school, and especially in its opposition to the cell-system,[2] have been inspired entirely by

[1] *Urbye*, "Les sentences indéterminées dans le projet de C. P. Norvégien," in the "Revue pénale suisse," 1898, p. 71; *Florian*, "La scuola positiva nel prog. di C. P. Norvegese," in the "Scuola positiva," 1898, p. 157; *Otlet*, "Les sentences indéterminées et la législation belge" (Brussels, 1898), p. 9; *Franchi*, "Di un sistema relativo di pene a tempo indeterminato," in the "Scuola positiva," 1900, p. 449.

[2] *Morrison*, "La scuola positiva nelle reforme penali inglesi," in the "Scuola positiva," 1874, p. 1072; *Jessie W. Mario*, "La crisi carceraria in Inghilterra" (*ibidem*, 1897), p. 316; *Griffiths*, "Le traitement pratique de la récidive," in the "Actes du Congrès international d' anthropologie criminelle" (Geneva, 1897), pp. 340 and 364. In Italy, prison reform is delayed; but one can foresee what it will be according to the draft of the law by Minister Giolitti for open air labor of convicts (5 Dec., 1902), which was one of the first affirmations of the positive school. See *Ferri* "Studii sulla criminalità ed altri saggi," pp. 163 *et seq.*; the lecture "Lavoro e celle dei condannati," at Rome, 24 Nov., 1885. See in the "Scuola positiva"

positivist ideas, which readily find lodgment in the Anglo-Saxon mind, as we shall also see in considering the theory of responsibility,[1] and which are therefore in that particular naturally in accord with the researches of criminal anthropology and criminal sociology.

The signification of all this is that in publications, as in congresses; in scientific societies as in private associations; in judicial practice as in legislative discussions; in administrative regulations as in statutory reforms; the new criminal school is ceaselessly spreading more and more, by forcing itself on public attention and by acquiring new champions. Indeed, to such an extent is this true, that it already has a history concerning which entire volumes of documents and bibliographical notes have been published.[2] With all the exuberance of its scientific and practical vitality, it has brought, and still brings, highly oxygenated air and lifegiving light into the schools and institutions that have hitherto remained separated from the actual world and secluded in the now sterile circles of syllogistic abstractions and metaphysical doctrinairism which (as Pasquale Stanislas Mancini himself admitted in his last address on the Penal Code) "had formerly supposed the delinquent to be enclosed in a glass case and that the physical and external influences about him scarcely concerned him at all." Thus the great Classicist himself recognized "the services which this criminal school has rendered and is able to render." [3]

This new energetic scientific force may therefore wait patiently and fearlessly, until the common conscience, illuminated in its turn by the irresistible study of facts, turns by a natural evolution towards the new doctrines, giving them, as once it gave the classical doctrines (which a century ago constituted a great scientific revolution), the sanction of its assent expressed in positive laws dealing with the morbid phenomena of crime and thus adequately

(Jan., Feb., 1903); *Franchi*, "Il progetto Giolitti per il lavoro dei condannati all' aperto, e il Diritto penale."

[1] See *post.*

[2] *Wulffert*, "The anthropologico-positive school of penal law in Italy" (in Russian), vol. I, 1887; vol. II, 1893; *Dorado Montero*, "L'Anthropologia Criminal en Italia" (Madrid, 1890), 1 vol., of 177 pages; *Frassati*, "La nuova scuola di diritto penale in Italia ed all' estero" (Turin, 1891), 1 vol., of 477 pages; *De Quiros*, "Las nuevas teorias de la criminalidad" (Madrid, 1898), 1 vol. of 357 pages (translated into English and published as the first volume of this Series).

[3] *Mancini*, in the "Atti parlamentari," 7 June, 1888, p. 3338, and in my book "Difese penali" (Turin, 1889), p. 356.

administering that self-styled "penal justice," which until now, either through barbarous popular prejudice or class interest, has been enveloped in the sanguinary mists of the spirit of hatred and vengeance.

§ 17. Criminal Sociology,— the Programme.

Hence, to recapitulate, the positive criminal school does not consist, as it seems convenient for many of its critics to feign to believe, only in the anthropological study of the criminal; it constitutes a complete renovation, — a radical change of scientific method in the study of criminal social pathology and in the study of what is most effectual among the social and juridical remedies that social pathology presents. The science of crimes and punishments was formerly a doctrinal exposition of the syllogisms brought forth by the sole force of logical phantasy. Our school has made of it a science of positive observation, which, based on anthropology, psychology, and criminal statistics as well as on criminal law and studies relative to imprisonment, becomes the synthetic science to which I myself gave the name "Criminal Sociology." Who would have said that the observations of Laplace on the nebular theory, the voyages of exploration in savage lands, the first studies of Camper, White, and Blumenbach of measurements of the human skull and skeleton, the researches of Darwin on the variations obtained in breeding cattle, or the observations of Haeckel in embryology — might some day be of interest to criminal law? With the present division of scientific labor, it becomes difficult to foresee the possible connection between branches of science so diverse and so far removed from one another. And yet it was these astronomical observations, these recitals of travel which show in the savages of to-day the infancy of primitive humanity and also these zoölogical and anthropological investigations, that gave birth to the first idea, yielding repeated proofs of the universal law of evolution which has dominated and renewed the whole scientific world, not excepting the moral and social sciences, among which definitely figures criminal law. And it is with these discoveries, intimately concerning man, that the criminologist of to-day must occupy himself, in order to seek from the experimental sciences, a positive base for his juridical and social conceptions, unless he consents to resign himself to that mere exercise of rhetoric to which daily practice in the criminal courts gives the lie.

The juridical valuation of criminal acts strictly concerns the criminologist. There are two main reasons why he can no longer put off considering it. The first is to prevent laymen drawing extravagant and erroneous conclusions from the facts which belie the old theories; the second, that while the other juridical sciences are concerned with social relations (abstracting individual particularities which do not directly change their value) — the doctrine of crimes and punishment, unlike them, has man, as he really lives and acts in the social medium, as its immediate object. It is clear that the classical criminologists would oppose this new scientific movement, were it only through the force of inertia. Accustomed as they are to build abstract theories with the aid of pure logic and without other tools than paper, pen, ink, and the volumes of their predecessors, it is natural that they should regret finding themselves forced, if not to make personal researches, at least to procure some positive knowledge of anthropology, psychology, and statistics. But the historical reasons for modern scientific thought, as we have indicated them above, render an increasing complexity in the science of crimes and punishments inevitable, arising from the law that things must develop in becoming more and more complex which is so in the physical as well as in the intellectual and moral order. Now in recapitulating the most serious and most flagrant divergences between the new results of the positive sciences (which study man as a physio-psychic organism, born and living in the midst of a fixed physical and social medium) and the metaphysical doctrines on crime punishment and penal justice of the past, I think I can reduce them to the following points.

Among the fundamental bases of criminal and penal law as heretofore understood are these three postulates:

1. The criminal has the same ideas, the same sentiments as any other man.

2. The principal effect of punishment is to arrest the excess and the increase of crime.

3. Man is endowed with free will or moral liberty; and for that reason, is morally guilty and legally responsible for his crimes.

On the other hand, one has only to go out of the scholastic circle of juridical studies and "a priori" affirmations, to find in opposition to the preceding assertions, these conclusions of the experimental sciences:

1. Anthropology shows by facts that the delinquent is not a

normal man; that on the contrary he represents a special class, a variation of the human race through organic and psychical abnormalities, either hereditary or acquired.

2. Statistics prove that the appearance, increase, decrease, or disappearance of crime depends upon other reasons than the punishments prescribed by the codes and applied by the courts.

3. Positive psychology has demonstrated that the pretended free will is a purely subjective illusion.

At first glance it would seem that the new conclusions founded on facts could be nothing less than the funeral oration of penal law. Indeed, this might have been dreaded, did we not believe that every social phenomenon and every institution, far from being the result of human caprice or arbitrary establishment is, on the contrary, a necessary consequence of conditions natural to the existence of humanity and that for this reason as long as these conditions be not essentially changed — which until now has not happened — the foundation itself of these institutions must subsist whatever change may take place in the manner of sustaining, studying, and regulating them in conformity with new conditions, founded on facts.[1] The very purpose of this work is to prove that penal law, whether as a function exercised by society in self-defense, or as a collection of scientific principles intended to regu-

[1] I have treated in "Socialismo e criminalità" (Turin, 1883; out of print) a quite different question from whether in a social order entirely different from the actual social order and such as socialism foresees it, crime must entirely disappear and with it every function not only penal in character but for social preservation.

In that book, I recognized the "substantial truth of socialism," but I combated the declarations and romantic visions of sentimental socialism then dominant in Italy. Later, when there developed also in Italy a current of scientific and positive socialism (Marx), I recognized its fundamental accord with the theories of biological evolution (Spencer), and this I demonstrated in the book "Socialismo e scienza positiva" (Rome, 1894, 2d ed. in press, and Paris, Giard et Brière, 1896), and did but confirm and explain my former conviction of the "substantial truth of socialism." I there also confirmed my opinion that under a socialist régime, crime in its most numerous and epidemic forms would disappear — in the forms determined by natural and moral suffering; but it would not completely disappear and would subsist in the sporadic forms of extreme cases. The partisans of scientific socialism rallied to this opinion, abandoning the former monosyllabic and sentimental claims of a complete disappearance of every criminal manifestation.

The positive criminal school in demonstrating the pathological nature of crime, and consequently in transforming penal justice from an empirical punishment for moral defects that are impossible of definition and from an instrument of class domination into a function of social preservation, as for the contagiously diseased, the insane, etc., and hence fully and obviously in accord with scientific socialism — really gives to socialism a very solid foundation aside from economic doctrines.

late this function, always has its reasons for existence. But it will at the same time point out the thorough renovation which is being produced in the spirit and in the practical applications of penal law. And this renovation finds its synthetic expression in the following declaration: We should henceforth devote ourselves not to doctrinal criminal law but to positive criminal sociology in the sense and with the results that I shall develop in the following chapters.

That is the reason why this work on criminal sociology, from the first edition (1881) to the third (anterior to my open adhesion to socialism), is able to remain intact, in its general lines, down to this edition, reconciling perfectly its inductions with the data and conclusions of scientific socialism.

PART I

DATA OF CRIMINAL ANTHROPOLOGY

CHAPTER I

NATURAL HISTORY OF CRIMINAL MAN

The genesis of the anthropological criminal school. Methods. Value of data. Observation of Criminals.

§ 18. The Genesis of the Anthropological Criminal School.

It was such data [1] which first of all inaugurated the present renewal of criminal science and which gave a name to the new school currently designated by many people as the Anthropologico-criminal School. This name may now be insufficient because in the few years of its existence the positive school has also already utilized and made the data of psychology, statistics, and sociology part of its own substance; still, the first impulse to the new school was due to anthropological studies. And this impulse came after a useful preparatory phase in which Lombroso, having united scattered and fragmentary observations on criminals in one organic whole, enriched it by his personal and original researches and, breathing life into it, really founded the new science of criminal anthropology. And naturally (since as Pascal says man is the most wonderful object of study for man) even in the most ancient observers fragmentary traces of anthropology in general and of criminal anthropology in particular, are encountered; especially are there traces of the latter, because if man has an interest in knowing his fellow-men, it is useful to him for even stronger reasons to know the most dangerous and, in certain respects, the most interesting, that is, criminals.

And by the same reasoning, if popular experience has attempted (at all times) to formulate in numerous proverbs some of the most evident data of this instructive art of judging men

[1] Data ("données") evidently signifies here not conceded propositions upon which a reasoning is built, but the results furnished ("données") by one science and upon which another may rely. *Trans.*

by experience, these studies in criminal anthropology still have a great attraction for the public mind which has given our new criminal school an inaccurate name. Thus it is, that through the effects of unconscious tradition, criminal anthropologists are often supposed to be only phrenologists and physiognomists; they are especially so considered by the amateur critics with whom we have occupied ourselves elsewhere. There is a steady advance from the earliest observations on physiognomy in Plato, who compares the features and character of man with those of animals, and in Aristotle who studied the physio-psychological relations between the features of man and his dominant passions, passing over the errors of chiromancy, of metoscopy, of podomancy, etc., in the Middle Ages, to 1600, when studies in physiognomy developed with the works of the Jesuit Niquezio, Cortes, Cardan, De la Chambre, and especially of the Neapolitan, Della Porta, who openly combated the illusions of judicial astrology, and of Ingegneri, whose works afford us genial intuitions confirmed by recent labors.[1] Such were the immediate precursors of the famous physiognomy and phrenology of Lavator, Gall, and Spurzheim, who inspired Lauvergne in his studies of convicts (1861) and Attomyr (1832), both of whom lost themselves in the exaggerations of those basic scientific elements. Then in the field of scientific observation in the last century, studies on the expression of human feelings were pursued by Camper, Bel, Engel, Burgess, Duchenne, Gratiolet, Piderit, Mantegazza, Tebaldi, Schaffausen, Schack, and especially Darwin. In the special study of delinquents (aside from the indications of the old phrenology and the opinions published by some of the ancient Italian phrenologists) in addition to Lauvergne in France and Attomyr in Germany, Derolandis published in Italy the necroscopy of a

[1] As another confirmation of the facts observed by criminal anthropology, we have the genial intuitions of art, which, from Greek tragedy to Shakespeare, from Dante to the moderns, and in the masterpieces of painting, have seized and illuminated the organic and psychic stigmata of criminals. See *Mayor*, "Iconografia dei Césari" (Rome, 1885); *Lefort*, "Le type criminel d'après les savants et les artistes" (Lyons, 1892); *Patrizi*, "La psicologia e l'anthropologia criminale nel romanzo contemporeano" (Turin, 1892); *Ferri*, "Les criminels dans l'art," 2d ed. (Paris Alcan, 1902); *Sighele*, "Delitti e delinquenti danteschi" (Trent, 1896); *Ziino*, "Shakespeare e la scienza moderna" (Palermo, 1897); *Niceforo*, "Criminali e degenerati dell' Inferno dantesco" (Turin, 1898); *Benedikt*, Kriminal Anthropologie in der Kunst und in der Wissenschaft,' in the "Deutsche Revue" (February, 1898); *Galante*, "Due delinquenti nell' arte," in the "Anomalo" (July, 1898); *Leggiardi*, "I criminali in A. Manzoni," in the "Archivio di psichiatria," XIX, 349.

criminal (1835). Félix Voisin, in 1837, presented to the Academy a memorial "on the defective cerebral organization of the greater portion of criminals"; Samson, in America, indicated the relations between criminality and cerebral organization; in Germany, Casper published a study on the physiognomy of murderers (1854), and Ave Lallemant published a voluminous monograph, largely psychological, on German criminals (1858–1862).

It may be said, however, that the present movement in anthropologico-criminal studies began most particularly with the researches of some English prison doctors and other specialists, such as Winslow (1854), Mayhew (1860), Thomson (1870), Nicolson (1872), Maudsley (1873), and with that quite remarkable work of Despine (1868), which, with that of Ave Lallemant, represents (only in the field of psychology, however,) the most important effort which had preceded the work of Lombroso. Yet it is his work which deserves the merit of having made criminal anthropology a new and distinct branch of science detached from the trunk of general anthropology, which itself came into being scarcely a century ago, with the special labors of Daubenton, Blumenbach, Camper, White, and Prichard. The work of Lombroso has two original sins. The first is that it gave (but really mostly in form) an excessive importance to craniological and anthropometrical, in comparison with psychological, data: the second, that it confused (in the first two editions) all criminals in a single type, distinguishing only as a special type (in the second edition) the authors of crimes of passion and contradistinguishing the insane by the description of characteristics which differentiate them from real criminals.[1] These original sins, which were corrected and avoided, the second particularly, in successive editions, in nowise obscured (since perfection is accorded to no one) these two luminous facts: first, that immediately after the "Uomo delinquente" there was published in Italy and elsewhere an abundant library of criminal anthropology; and second, that then the new school was organized with an unity of method, with starting points and aims, with a scientific fertility theretofore unknown to classical criminal science.

[1] The fifth edition of "L'uomo delinquente" (Turin, 1877) is divided into three volumes, of which the first, treating of the born-criminal, has already been translated into several languages. The second treats (not to mention the moral and epileptic insane) of the other criminal types; criminals by passion, insane (alcoholic, hysterical, mattoid), occasional, habitual. The third volume treats of

§ 19. The Methods of the Anthropological Criminal School.

What then is this criminal anthropology? What are the data that it has collected up till now and which, henceforward, as partial syntheses, will permit the general principles of the law of social defense to be traced and consequently direct and support the inductions of criminal sociology? Since general anthropology, according to the definition of Quatrefages, is "the natural history of man as zoölogy is the natural history of animals," criminal anthropology is but the study of a human variation of a particular type; hence it is the natural history of criminal man, the same as psychiatric anthropology is the natural history of demented man. That is to say that it undertakes those studies of the criminal's organic and psychical constitution and social life or relations, which the anthropologist has undertaken for man in general and for the different human races. This suffices to explain the wonderful success in results which have already enriched this new science. Furthermore, as anthropology in the study of man in general has, by virtue only of its method of observation and experiment, recorded such astonishing successes in so few years in comparison with the ancient philosophy or "a priori" psychology, — so, in the study of crime and of the criminal, this subdivision of anthropology has recorded surprising successes in comparison with the classical criminal science, thanks only to the efficacy of substituting the positive for the "a priori" method of pure subjective observation. And as I have already said, while the classical jurists studied and still study crimes in their abstract form, starting with the "a priori" supposition that he who commits a crime (save in the exceptional and evident cases of infancy, insanity, drunkenness, or physical disability) is a man like other men, endowed with intelligence and normal feelings, the criminal anthropologists on the contrary submit the criminal to a direct examination on the dissecting table, in the physiological laboratories, prisons, and insane asylums, both organically and psychically comparing his characteristics with those presented by the normal and the insane. Now, these physical and psychical observations have led the anthropologists to affirm and have also proved that criminal man not only (as the English authors first said) may belong to an "intermediate zone" between the sane and

the etiology, the prophylaxis, and the therapy of crime with a synthesis and penal applications.

the insane, but that he constitutes, strictly speaking (as Lombroso showed and as others since have become convinced), a distinct anthropological variety which presents special traits both from the point of view of pathology and from that of degeneracy and atavism; and that, especially in these latter traits, he represents the inferior races in our actual civilization; and finally, that he is in every respect different from the normal type of healthy, well-developed, and civilized man. Indeed, this idea that criminal man, particularly in his most characteristic type, is a savage in our civilization, had doubtless been indicated by Mayhew, Eugène Sue, Despine, Lubbock, and others[1] before Lombroso. But this fact should not be taken, as these authors thought, in a purely literary sense. Its scientific value should be strictly recognized in relation to the Darwinian or genetico-experimental method, as Vignoli[2] calls it, and conformably to the whole natural principle of evolution. In my opinion, one of the greatest scientific benefits which criminal anthropology owes to Lombroso is precisely that he illumined the study of the criminal man of to-day, with the idea that he, whether by an atavistic return, degeneracy, arrested development, or some pathological condition, truly reproduces the organic or psychical traits of primitive humanity. The idea is most happy, since, supplemented with that other idea of Sergi[3] "on the stratification of character," it explains at a glance the why and how of the most singular traits of the typical criminal, especially from the psychological point of view. These

[1] *Lubbock*, "The Origin of Civilization and the Primitive Condition of Man" (London, 1889), indicates this idea in passing: "In reality our criminal population is composed of pure savages whose crimes are largely but senseless and desperate efforts to act as savages, in the midst and at the expense of a civilized society." Before him *Despine*, "Psychologie naturelle" (1868), III, p. 300, has said that "brigandage could be defined as the savage state in the midst of a civilized people." This had already been expressed by *Eugène Sue* from familiar studies from nature, in the first chapter of "Mystères de Paris." *Mayhew*, in turn wrote: "It has been noted that in our cities the dangerous classes, who are vagabonds and savages, present the same anthropological traits as the nomadic tribes, Kaffirs, Fellahs, etc. and in their faces show a great development of the jaws." "London Labor and London Poor" (1847, p. 4).

[2] *Vignoli*, "Carlo Darwin et il pensiero," in the "Rivista de filosofia scientifica," III, 270.

[3] *Sergi*, "La stratificazione del carattere e la delinquenza," R. F. S. (April, 1883). The concept was already indicated by *Ardigò*, "Relatività della logica umana," in the "Cronaca Bizantina" (15 August, 1881), and in his works, vol. III (Padua 1885), p. 418. This idea of stratification for social evolution in relation to the different classes had also been indicated by *Ray Lancaster*, "De la dégénérescence," in the "Revue internationale des sciences biologiques" (1882).

traits are abnormal in civilized men, but common and normal among the inferior races. It is a further guide in the ulterior study of the anthropological characteristics of the criminal in showing his methods when barbarous and savage. In the savage, and also in the civilized child, the law formulated by Haeckel[1] "that for physical organisms, the development of the individual ('ontogénie') reproduces and resumes the phases of development of the species that have preceded it in the zoölogical series ('phylogénie')" should be supplemented by the observations of Lilienfeld, Spencer, Perez, Preyer, and others extending it to the psychical development.[2] It is precisely thus that the typical criminal, aside from his traits of an adult savage, reproduces also, while retaining them permanently, the traits which in a civilized man are appropriate to infancy, and hence transitory. Thus what is so accurately said of savages (that they are big children) can be said with truth of the criminals who, without mentioning the most striking cases of real infantilism,[3] are always in a state of prolonged infancy.[4] Consequently this idea, drawn as one can see from the natural principle of evolution, is sufficient to make instantly comprehensible, even to those who are not initiated in the anthropological sciences, the entire value of the new data of criminal anthropology.

§ 20. Value of Anthropological Data in Anthropology and Criminal Sociology.

But with respect to this data, before briefly summing it up here, and even before replying to the principal objections it has aroused, it is important to insist on a general consideration already

[1] *Haeckel*, "Anthropogenie," Lec. I, p. 5.

[2] *Majorana* later developed this thought in his work, "Ipostesi di una legge di embriologia sociale," in the "Archivio di diritto pubblico," I, fasc. 1.

[3] *Brouardel*, "De l'enfance des criminels dans ses rapports avec la prédisposition naturelle au crime," in the "Actes du congrès d'anthropologie criminelle" (Paris 1890), p. 385; *Meige*, "L'infantilisme," in the "Revue internationale de medicin et de chirugie" (1898), No. 6.

[4] *Lombroso* and *Marro* "I germi del delitto e della pazzia morale nei fanciulli," A. P. (1883), pp. 7 and 153; *Lombroso*, "L'uomo delinquente," I, pp. 98 *et seq.*; *Perez*, "Les trois premières années de l'enfant." — "L'enfant de trois à sept ans." — "L'education morale dès le berceau" (Paris, 1894–96); *Preyer*, "Die Seele des Kindes" (Leipsic, 1882); *Compayré*, L'evolution intellectuelle et morale de l'enfant," 2d ed. (Paris, 1896); *Baldwin*, "Le dévellopement mental chez l'enfant et dans la race"; *Anfossi*, "L'onestà nei bambini," A. P. XVIII, 531; *Paola Lombroso*, "Saggi psicologici sui bambini" (Turin, 1896); *Schinz*, "La moralité de l'enfant," in the "Revue philosophique," March, 1898, and *Sully*, "Études sur l'enfance" (Paris, 1898).

advanced by me in previous editions but which the opponents of the new school have found it convenient to disregard in their biased criticisms: The technical value of the anthropological data on the criminal must be distinguished from its scientific value in criminal sociology. To the criminal anthropologist who is concerned with the natural history of the delinquent, all of the data has its own anatomical, physiological, or psychological value, regardless of the sociological deductions that may be drawn from it. This is why the technical side of the continuous detailed researches, on the organic and psychic constitution of the criminal, is the field reserved to the new autonomous science of criminal anthropology. On the other hand, to the criminal sociologist this data, which is the culmination of anthropology, is but the point of beginning in reaching juridico-social conclusions which escape the special competence of the anthropologist. It may be said, in fact, that criminal anthropology is to criminal sociology what the biological sciences, both descriptive and experimental, are to the clinic.[1] That is to say, that as the clinical physician is not bound independently to sound the depths of anatomy and physiology he must at least know their final indicia in order to draw his diagnostic and therapeutic inductions; so the criminal sociologist is satisfied with being an adept in the juridico-social sciences and consequently is not obliged to make his own anthropological studies of the criminal. His sole scientific duty is to take as the basis of his inductions, not the syllogistic premises of crime considered as an abstract entity, but rather the positive data of the individual causes of criminality furnished by criminal anthropology together with the determined external causes of crime furnished by criminal statistics. Assuredly, as happened at the inception of the new school, the criminal sociologist, not content with reading the works on criminal anthropology, may make his own personal studies on the physical and psychical constitution of criminals and thereby derive the paramount advantage flowing from the secret of the positive method, for direct observation of a single fact is more profitable than the reading of several volumes. At all events, in our opinion the technical study of criminal anthropology is not, as some would have made us assert, a professional obligation for the criminal sociologist. He is bound only to rely upon the synthetic and final notions of anthropology,

[1] See, on a similar subject: *Lester Ward*, "Relation of Sociology to Anthropology," in the "American Anthropologist" (July, 1896).

psychology, and statistics which those sciences furnish him. Then again, one understands how many questions which directly interest criminal anthropology with respect to the accuracy or even the biologic interpretation of some special data, may concern criminal sociology only in a secondary manner. For this reason the question is not well put by Messedaglia and others, in the form, "what relation can there be between a more or less elevated cephalic index and a propensity to homicide?"[1] or, "what is the relation between a frontal protuberance and the responsibility of him who has it?" for such is not the scientific function of anthropological data in criminal sociology. The only legitimate decision that we may demand of the anthropologists is this: "Is the criminal always or in what cases is he a normal or an abnormal man? And if abnormal, whence comes this abnormality? Is it congenital or acquired, corrigible or incorrigible?" This is all we can ask of criminal anthropology and it suffices for the jurist or, to express it better, for the criminal sociologist in the making of his deductions on the necessity and the forms of social defense against crime, as from other points of view he demands other data of criminal statistics. To come, then, to a summary indication of the principal results hitherto established by criminal anthropology (referring the reader to the numerous special treatises for minute details),[2] we must bear in mind that the criminal is studied under the two inseparable and fundamental aspects of animal life and human life which constitute man organically and psychically. Naturally the organic study comes first, not only because the organ which is the physical basis must be studied before the function, but also because, in a fight with the unknown (which

[1] *Messedaglia*, "Le statistica della criminalità," in the "Archivio di statistica," III (Rome, 1878).

[2] The fifth edition of "L'uomo delinquente" of *Lombroso*, contains the most complete and most analytical exposition of it. Among the jurists and sociologists the following summaries may be sufficient: *Riccardi*, "Dati fundamentali di anthropologia criminale," in the "Trattato di diritto penale" (published by Cogliolo, Milan, 1889), Vol. I, Part III; *Corre*, "Les criminels" (Paris, 1889); *Havelock Ellis*, "The Criminal" (London, 1890); Francotti, "L'anthropologie criminelle" (Paris, 1891); *Kurella*, "Naturgeschichte des Verbrechers" (Stuttgart, 1893); *MacDonald*, "Criminology," 1st part (New York, 1893); *Dallemagne*, "Stigmates anatomiques" (Paris, 1896), "Stigmates bio-sociologiques de la criminalité" (Paris, 1896), 2d volume; — and especially: *Severi*, "L'uomo criminale" in the "Manuale di medecina legale" of *Filippi*, 2d ed. (Milan, 1897), Vol. III; *Angiosella*, "Manuale di antropologia criminale" (Milan, 1898). For researches to be made on criminals see *Ottolenghi*, "Prospetto sinottico," in the "Rivista di polizia scientifica" (November, 1897), p. 119.

scientific research is) it is necessary to adopt the tactics of a siege, beginning with the occupation and knowledge of distant points in order gradually to reach the more central points most directly involved in the ultimate phenomenon whose natural conditions are to be determined. This is why the reproach, heretofore so commonly applied to criminal anthropology, that it adheres too much to the study of the craniology of the delinquent (which is, people rightly say, far from indicating the immediate determinants of crime), would perhaps be well-founded if it made any pretension to be limited to this study. But there is nothing serious in the objection for one who knows that, as the organic study of the delinquent is only the preface to the psycho-sociological study which is to follow it, so likewise in the organo-logical field the most remote researches on the cranium, on physiognomy, etc., are but the zigzags and parallels of a siege which are always and which already with marked predominance have been followed up and perfected by more direct researches on the brain (morphology, intimate structure, and pathology) and on the biological conditions of the organism. This has been demonstrated by the bibliography of even the last few years.

§ 21. Craniological Data.

In the meantime, with respect to the craniological data, especially in the case of the two most marked types of criminal, the murderer and the thief, representing two fundamental and primitive forms of criminal activity, there has been shown a general inferiority in the forms of the skull coupled with a greater frequency of atavistic and pathological anomalies often extraordinarily accumulated in the same individual. Further, the examination of the brains of criminals revealing a morphological and histological inferiority in the thinking organ, has also permitted the demonstration of a very noticeable frequency of pathological conditions which in most instances would not have drawn attention to the individual during life. So true is this that Dally quite a long time ago declared that "all the criminals (decapitated) on whom he made an autopsy showed cerebral lesions." [1]

[1] *Dally*, "Discussion before the Société de la médicine psychologique de Paris" in the "Annales de la médicine psychologique" (1881), I, pp. 93, 266, 280, 483.

§ 22. Physical Data.

The researches, made on other parts of the body, have also established singular characteristics from the most exterior, such as tattooing, down to the most hidden, such as profound congenital anomalies in the conformation of the skeleton and of the viscera or in pathological conditions which have supervened. Again, researches lately made on the exchange of physiological materials in the organism of criminals, and especially on their general sensibility to pain, on each of their senses and on their physiological reaction to exterior stimulation, in tests with sphygmographic appliances, have disclosed in a very large number of them abnormal conditions all resulting in an extraordinary physical insensibility (whence their resistance to wounds, and their longevity), which, when measured by the scale of an algometer or the curve of the sphygmograph, show the material base and the speaking counterpart in the physical make-up of that moral insensibility which reveals the fundamental anomaly of their psychic constitution. Again, these organic conditions which may be more or less evident but which will be more and more clearly unmasked by further studies, give us the only intelligible explanation of the singularly eloquent phenomenon: The hereditary transmission from generation to generation of criminal tendencies as of any other physical or moral deformity.[1]

§ 23. Criminal Psychology; Moral Insensibility and Lack of Foresight.

The study of criminal psychology has a greater importance and a more direct relation with criminality than the purely organic study (both for us and for Lombroso himself in his later editions).[2]

[1] A few years ago there was a current of thought among the naturalists which, following the purely logical and non-experimental hypotheses of *Weissman*, "Essais sur l' hérédité" (Paris, 1882), denied the hereditary transmission of acquired traits. But to-day, Weissmanism has gone out of fashion, conquered by Darwinism (renewed with Lamarckism) because logical fancies, no matter how seductive, are always less durable than the positive observation of facts. See *Le Dantec*, "Les néo-darwiniens et l'hérédité des caractères acquis," R. P. (January, 1899).

[2] And yet most of our critics, while they dallied beyond measure with syllogistic and non-experimental tests of each of the anatomical data of criminal anthropology (and almost exclusively in relation to the skull), still kept a prudent or a too frivolously shifty silence on the much more imposing whole series of data of criminal psychology. Yet this fixed idea that all criminal anthropology is reduced to the measurement of the *skull* was again repeated, in August, 1896, at the Congress of German Naturalists at Speyer by *Virchow* (in a communication on crim-

Besides giving us certain characteristic traits, I might almost say a descriptive order, such as the jargon, the peculiar writing, the hieroglyphics and the special literature of the criminal, this study further offers us a series of data which, corresponding with those we have mentioned from the organic point of view, has shed light on the individual genesis of crime. These psychological indicia, unless I am in error, should be traced to two fundamental forms of anomalies, corresponding with the two psychological determinants of every human action, sentiment, and idea, that is to say, is traced to moral insensibility and to lack of foresight. Moral insensibility, much more congenital than acquired, whether total or partial, is disclosed in sanguinary as in other crimes, by a series of manifestations which I might reproduce here but which are all reducible in the majority of criminals to the following two conditions of moral and social feeling: non-repugnance to the idea or to the criminal act before the crime and absence of remorse after the crime.

These conditions are clearly quite removed from the normal psychic constitution of honest men or of men exceptionally drawn to crime rather by the complicity of their environment than by the impulse of their own physical and moral personality. They are not only different in themselves but in the attitude which they determine in all the other sentiments egoistic or altruistic of criminals. Among such persons the feelings appropriate to a normal man of the class to which they belong are not at all lacking; only, instead of being forces opposed to crime, such as the sentiments of religion, honor, friendship, or love, they either are quiescent in the moral dynamics or else themselves become stimulants of crime, such as the sentiments of pride, vengeance, or cupidity, as well as the sense of self-indulgence, which is savagely unchained in the passions of eroticism, gaming, gluttony, and intemperate revelry. With this moral insensibility, which from the psychic point of view is the first cause of crime viewed as an exterior manifestation of individual tendencies, there is combined lack of foresight which is determined by insufficient force in the association of ideas and which also is betrayed by different manifestations all concurring to destroy the last resistance to crime, which would come properly from foreseeing the painful consequences which must ensue. It is to these traits of fundamental

inal anthropology), to whom *Lombroso* replied point for point. "Zukunft" (August, 1896), and "Idea liberale" (27 September, 1896).

psychic anomaly that we can trace in the greater part of criminals the exaggerated and unbalanced impulsiveness which determines abnormal and criminal activity and which is one of the most striking characteristics in the psychology of the savage and the child. Such then, in general outline, are the data of criminal anthropology, with respect to the organic and psychic make-up of the criminal.[1] If a technical and analytical examination of this data is out of place here, general criminal sociology will have before it on one hand, a series of objections, not partially but fundamentally opposed to these anthropological features, and on the other, the field once freed from these more or less syllogistic obstacles, a problem of capital importance, not only from the point of view of exact scientific knowledge of anthropologico-criminal data but especially from the practical and social point of view, for the study of the most available means in the fight against crime.

[1] I have published an annotated study of the data of criminal psychology in my volume entitled "L'omicidio nell' anthropologia criminale," accompanied by a statistical anthropological atlas (Bocca, 1895).

CHAPTER II

FUNDAMENTAL OBJECTIONS TO DATA OF ANTHROPOLOGY

Methods. Scientific assumption. Disagreement of data. Criminal traits in honest men. Historical and anthropological indetermination of crime. Definition of crime. The criminal type. Origin and nature of criminality.

§ 24. Objections Advanced Against Criminal Anthropology.

While leaving to polemical writings published elsewhere the care of replying to criticisms which are partial or inspired by philosophical and juridical traditionalism,[1] we consider it proper to recapitulate the fundamental objections which either a single critic or at times several have directed in a scientific spirit to the methods and general conclusions of criminal anthropology; they bear on the following points:

I. Methods employed in the study of criminals.
II. Scientific assumption of criminal anthropology.
III. Qualitative and quantitative disagreements in the data of criminal anthropology.
IV. The presence of criminal traits, even in honest people on the one hand, and on the other in the non-criminal insane and in degenerates in general.
V. The historical and anthropological indetermination of crime.
VI. Non-existence of the anthropological criminal type.
VII. Divergences in the scientific determination of the origin and nature of delinquency.

§ 25. Methods Employed in the Study of Criminals; Small Number of Criminals Examined.

The criticisms directed at the method employed in the study of criminals were two: small number of the individuals examined,

[1] "Polemica in difesa della scuola criminale positiva" (Bologna, 1886); "Uno spiritista del diritto penale" (in reply to *Lucchini*, "I semplicisti"), A. P. (1887), fasc. 1, 2. Preface of the Spanish edition of "Nuovi orizzonti" (Madrid, 1887) (in reply to the book of *De Aramburu*); works collected in *Ferri*, "Studi sulla criminalità ed altri saggi."

and inexactness of comparison between criminals and normal persons. Our adversaries have finally abandoned the first criticism. As early as 1893 Lombroso, in enumerating the delinquents studied only from the biological point of view by anthropologists, computed their number at fifty-four thousand, delinquents, insane, and normal individuals, [1] without considering that this number would be greatly increased if there were added the delinquents who have been studied only from the psychological standpoint through the records of their trials and the medico-legal experts, and that the whole number has greatly increased since 1893. If, with such immense materials for study at hand, the objection were made that this number is insignificant compared with the hundreds of thousands of delinquents and consequently is rendered valueless by the law of great numbers, we might have something to say in reply. First of all, it is a metaphysical prejudice not to accord importance to what are called isolated facts. Nature has no isolated facts, because each fact thus denominated is the index and the symptom of a system of causes and of laws. Scientific discoveries always spring from the attention bestowed upon those isolated facts which are commonly termed accidental or exceptional. Rümelin rightly said that the secret of the great progress in natural sciences is to be found in the rule that "in nature, each particular case may serve as a type." [2] In the second place, let us hasten to recall, even in reference to the anthropological deductions, a biological law which in my opinion should be combined with the law of great numbers, namely, the law by which in general, biological evidences of the greater importance are subject to slight variations.[3] It is easy to give a great many proofs of this: for instance, if the length of the arm may vary by several centimeters in different men, on the other hand the width of the forehead can vary only by a few millimeters.[4] Hence, this evident consequence, that in anthropo-

[1] *Lombroso*, "Le più recenti scoperte ed applicazione dell'anthropologia criminale" (Turin, 1893), p. VI.

[2] *Rumelin*, "Problèmes d'economie politique et de statistique" (Paris, 1896), p. 87.

[3] *Quételet*, "Fisica sociale", in the "Biblioteca dell'Economia," pp. 636–637; "Antropometria," *ibid.*, pp. 983, 1004; *Topinard*, "Anthropologie" (Paris, 1879), 3d edition, p. 225; *Milne-Edwards*, "Introduction to General Zoölogy," pp. 9 *et seq.*; *Messedaglia*, "Di alcuni argomenti di statistica teorica," in A. S. (1880), see p. 26; *Dallemagne*, "Stigmates économiques de la criminalité" (Paris, 1896), p. 43.

[4] This does not contradict what Darwin said of the variations even of the most important organs among individuals of the same species, "On the Origin of

logical researches the necessity for great numbers is in a direct ratio with the variability of the characteristics studied or in an inverse ratio with their biological importance. It may be stated, therefore, not that the criticisms of the haste of many anthropologists (especially in the beginnings of the science) to draw conclusions from very rare observations, are entirely without foundation, but that the law of numbers should be conceded a "rationabile obsequium." That law does not in fact teach us the precise moment when the appreciable value of observations begins and its value therefore is entirely relative; it means only that the weight of one hundred observations is less than that of one thousand, but not that such weight is null. It does not even say that the value of one thousand observations is ten times the value of one hundred. The positive value of a conclusion commences with the first observation and increases, but in a decreasing progression relatively to the number of observations, and the need of great numbers is regulated by the diverse variability in the elements studied;[1] so that, if these elements were absolutely invariable it would be enough to study a single one, in order to extend the deduction to all the others.[2] Thus Quételet was convinced that it was not necessary to repeat his anthropometrical researches on a great number of subjects, to determine characteristics which have a restricted limit of variations; Broca, for example, fixes the number "of subjects of a type series at twenty" for craniological and anthropometrical studies;[3] and Durkheim rightly says, following Bacon, that it is inexact to say that "science cannot establish laws until after passing in review all the facts which the laws express."[4] In criminal statistics, on the other hand, where these limits are broader, it has been recog-

Species" (London, 1888); he speaks of absolute differences between individuals while we are here considering the degree of relative variability in the various anthropological characteristics.

[1] Thus, in my anthropological studies on homicides I demonstrated that the partial and numerically limited series often reproduce the disposition of entire and numerically strong series. "Omicidio" p. 203, 204.

[2] *Schaëffle*, "Bau und Leben des Socialies Körpers," VII, 109, cites the opinion of *Lotze*, "Logica," § 287, who denies to the so-called "law of great numbers" the true character of a law, since it does not in itself contain any necessary consequence, being given the premise which constitutes its object, while this is not true of all real natural laws. See also *Rumelin*, for a notion of a social law, in the "Problèmes d'economie politique et statistique" (Paris, 1896), p. 15; and *Tammeo*, "La statistica" (Turin, 1896), p. 173.

[3] *Broca*, "Instructions anthropologiques génerales" (Paris, 1879), pp. 188, 189.

[4] *Durkheim*, "Les règles de la méthode sociologique" (Paris, 1895), p. 97.

nized, as we shall see, that the deductions of Quételet were premature because based upon only a few years; but this fact confirms rather than contradicts the preceding observations. Finally, there is a decisive consideration: we are entitled to presume that these positive deductions represent the truth until proof is made of the contrary, consisting not in abstract syllogisms or vague objections but in other not less positive deductions drawn from an equal or greater number of observed facts. But, we see the deductions of criminal anthropology receiving continued confirmations, — and nothing but confirmations, — whenever anthropometrical data are checked by the comparison of delinquents with honest people.

Winckler and Berends have lately applied differential calculus to anthropometrical data taken on normal persons and delinquents and they have mathematically demonstrated that they form two very distinct groups, corresponding to an actual and profound diversity of anthropological type (a diversity such as occurs among individuals belonging to quite different races) and confirming what I myself have shown; namely, that "in spite of great ethnical diversities of the different regions of Italy, there is often a greater difference between assassins and normal men of the same province, than between the normal individuals of different and distant provinces." Thus, for example, in cranial capacity, in frontal diameter, in frontal index, in the diameter of the jaws and in the development of the face, there is more difference between the assassins of the provinces of Naples, Calabria, and Sicily and the soldiers of the same provinces than there is between the soldiers of the southern regions and those of Lombardy and Venice.[1]

§ 26. Method Employed in the Study of Criminals; Inexactness of Comparisons.

The other objection directed to the method of criminal anthropology bears on the comparison between delinquents and normal persons. The claim is made that it is inaccurate, both in the numerical difference of the two series of individuals compared and in the difference between them in personal conditions. As

[1] *Winkler*, "Jets over criminele anthropologie" (Harlem, 1895); *Berends*, "Eenige Schedelmaten van Recruten, Moordenaars Epileptici, en Imbecillen" (Nimègue, 1886); *Ferri*, "L'Omicidio," pp. 205, 206; *Lombroso*, "Uomo delinquente," 5th ed. III, 633.

to the numerical difference, it does not exist in the case of many anthropologists: for, if Marro, for instance, compared five hundred delinquents with one hundred normal subjects, I can advert to my studies of seven hundred delinquents, seven hundred and eleven soldiers, and three hundred insane and, moreover, to the total figures reached by Lombroso where there is almost a numerical equality of delinquents and insane (about 27,000) and normal persons (about 25,000). In order to justify the inertia of the International Committee, appointed by the Congress of Paris, to make a comparative study of delinquents and normal persons, Manouvrier went so far as to present to the Brussels Congress a report intended to show by syllogisms the impossibility of "the comparative study of criminals and honest people,[1] — a study which, the contrary notwithstanding, is practised every day by criminal anthropologists.

More serious, however, is the second reproach made of the comparison of criminals with honest people where the subjects belong to different social classes. It has, indeed, been pointed out that in order to get two less heterogenous series, the comparison, should be made of individuals belonging to the same social class. This defective mode of comparison, however, is not met with in the greater part of anthropologico-criminal studies. For example, Lombroso, Ottolenghi, Tarnowski, and others have examined honest men and delinquents belonging to the same class and yet have obtained equally conclusive results. The same may be said of my studies of delinquents and of soldiers, which I have fully explained in "L'Omicidio," after I had made them by comparing subjects from the same provinces and for the greater part belonging to the same classes, *i. e.*, workmen and peasants. Further, in observing soldiers in comparison with delinquents of the same provinces, we have elements of comparison of a better fixed value; for, in soldiers we have the real normal type of the popular classes; that is, a contingent that excludes pathological elements.

Moreover, I supplemented these comparisons by considering also the insane, who form a third contingent from which the normal man is absolutely excluded. The insane afford a second term of comparison that is diametrically opposed to the normal and healthy type and on that account an effective means for counterproof in the comparative study of criminals.

[1] A. C. A. C. (Brussels, 1893), p. 171.

§ 27. Scientific Assumptions of Criminal Anthropology.

In view of the interdependence and interweaving of natural phenomena, criminal anthropology must take, as a foundation, the more general and more positive inductions of biological and natural sciences which embrace phenomena less complex and consequently anterior to human criminal acts, in the cosmic, physical, chemical, biological, and zoölogical orders as well as in general anthropology: so, likewise, criminal sociology must add other inductions of a more complex nature supplied by general sociology to this substructure of general scientific inductions. The objections, aimed from different quarters, at the scientific assumptions of criminal anthropology, could therefore directly interest this special science only in the case where its adepts should borrow but a few particular inductions from the physical and biological sciences. When, however, in the name of more or less disguised ancient ideas of free will, — which whether avowed or dissimulated are at the bottom of all the other objections of the spiritists and champions of classical criminal law, — when they criticise us on the application of the experimental method to the moral and social sciences, on the law of universal and biological evolution, on physical, psychological, and social determinism, or on the relativity of morals and law as historical products of social evolution, we see nothing in the controversy but an actual loss of time, since all discussion is useless and vain when the adversaries are not even agreed upon the general principles of science and philosophy. Among adversaries of this sort, I will mention De Aramburu, Brusa, Proal, and Pellizzari. Quite recently one of the declared partisans of natural or monistic philosophy, has disputed the scientific assumptions of anthropology and particularly the following three fundamental points; (a), the relation between the physical and moral in man; (b), the genetic relation between organs and functions; (c), the relation between the brain, the intelligence, and morality.[1] Colajanni uses more than ninety pages in denying relations without which it is simply impossible to conceive of any biological, psychological, or social science. It is a negation that I am unable to explain otherwise than as the effect of a masked spiritualism such as I have met with in other critics, who call themselves

[1] *Colajanni*, "Sociologia criminale" (Catania, 1889), pp. 74–162.

positivists or experimentalists but who are in reality mystics and metaphysicians; like Tarde for instance.

§ 28. Influence of Organic Conditions upon Moral Conduct.

That the conditions of the organism influence the moral conduct of individuals has been demonstrated by a myriad of clinical facts, among which it would be sufficient to recall the constant and inevitable variations of moral character produced by alcohol unless we should wish to resort to other instances, such as the influence of certain atmospheric conditions on nervous irritability and, hence, on the character and feelings of individuals. One of the most familiar instances of this kind is the wind of the American pampas which when it blows in a certain direction singularly excites the inhabitants of these wild regions and multiplies quarrels and homicides in an obvious and extraordinary way. And it is generally admitted that certain diets modify both the physiological state and the intellectual and moral condition of man and other animals. I wish to cite here but a single proof, one which will not be questioned, since it is dictated in all simplicity by the living reality of facts and without any scientific preoccupation whatever. Garibaldi, speaking of the American horsemen who never spared their fallen or wounded enemies, writes: "*The constant habit of a purely carnivorous nourishment* and the habit of slaughtering cattle daily is probably the cause that makes them so ready to commit homicide."[1] The clinical cases of mothers who are tenderly attached to their children in the intervals between their menstrual periods and who torment them and sometimes put them to death during such periods is still another proof. Do they not suffer anomalies, perhaps as yet unknown to the biologist but to the determining influence of which their moral state is nevertheless subject?

Also, what should be said of the changes of character following certain injuries to the head and of certain cases of moral cure, for example, after an operation on the skull releasing the brain from the pathological influence of an osteoma or a tumor, and of other moral cures, such as where a woman loses her evil instincts after the removal of her ovaries? Without putting into the crucible of experimental observations, all of the corollaries of Colajanni, so prodigiously imbued with animism, I will

[1] *Garibaldi*, "Memorie" (Florence, 1888), p. 174.

say with respect to the second point (genetic relation between organs and functions), that if the organ influences the function, the reverse is not less true. A man is a good runner if he has strong and well-developed lungs and conversely, track exercise favored by organic conditions increases the development of his lungs. It is also admissible, but not in an absolute way, that medicine may draw advantage from moral influence over the physical, by suggestion and by other phenomena which are of nervous and not mental origin.[1] One may also understand (but with benefit of inventory) the conclusion of Wundt that "the physical is not the cause but much rather the effect of psychic evolution," not only because this conclusion is not absolute and indicates only a predominance, that I persist in considering baseless, but also because it may be taken in the sense that the exercise of the function in different surroundings, by a return effect influences the development and even the transformation of the organ; and, finally, because Wundt himself weakens the dictum in the last paragraph on "the psycho-physical point of view," — a paragraph which begins as follows: "The psycho-physical examination should rest upon this principle universally established by experience, 'nothing comes into our consciousness without a fundamental sensatory basis in determinate physical processes.'"[2] But to assert absolutely and without reservation as does Colajanni, that "the function engenders the organ," is in my opinion a rational absurdity as well as an error in fact, for it is equivalent to saying that a function can exist *before* the corresponding organ which it must create. This is even more extreme than the old spiritualism, which at least to my knowledge never went so far as to claim that the soul creates the body. As to the third point (*relation between the brain, intelligence, and morality*), the conclusion from the biological sciences which criminal anthropology admits and appropriates is this: The brain is indisputably the organ of thought; but cerebral volume, although the most important element, is not the sole and exclusive determinant of the psychic development of the individual.[3]

[1] *Tuke*, "Influence of the Mind on the Body in Health and Disease" (London, 1877); *Bernheim*, "Neue Studien über Hypnotism, Suggestion und Psychotherapie" (Leipsic, 1892); *Ottolenghi*, "La suggestione e la facoltà psichiche occulte" (Turin, Bocca, 1900), p. 712.

[2] *Wundt*, "Grundzüge der Physiologie und Psychologie," 3d. edition (1884).

[3] This answers the repeated assertions of the anti-positivists on the relations between the skull, the brain, and thought: See on this subject *Simms*, "Weight of

§ 29. Sources of Objections to Anthropological Data.

The objections to the assumptions drawn by criminal anthropology from the modern biological sciences are evidently allied with the néo-vitalism which has shown itself here and there in Germany and with the néo-mysticism which has led to the declaration that science is bankrupt, — movements born of the politico-social reaction against the rise of the modern proletariat, and which I have heretofore combated.[1] However, these objections also have a more proximate determining cause in the preconceived idea of our adversaries, who see in criminality only the effect of social factors and who on that account seek by force of syllogisms to eliminate the biological factors at any cost. Even assuming that all modern biology were a tissue of errors, I yet have an argument of fact which I shall ceaselessly offer to all the opponents of criminal anthropology and which itself is an unanswerable reply to all the closet criticisms. It is this fact: In the prisons and in the insane asylums, confining ourselves to them, we know how to distinguish the born-murderer from the rest of criminals by bodily characteristics, especially in clean-cut cases, in accordance with data which I have given and which we have obtained not by abstract reasoning, but by studying one thousand seven hundred and eleven individuals in one year, comprising sound, insane, and criminal. To me, initiated as I am in the positive method, this fact of itself has more value than a hundred volumes of our adversaries' reasonings; it is enough to prove the truth of criminal anthropology and the actuality of the criminal type, notwithstanding errors of detail, which are indeed here present as in all other natural sciences, and notwithstanding all the controversial artifices of our opponents.[2] It is true that the

the Brain and Intellectual Capacity," in "Appleton's Popular Science" (December, 1898).

[1] *Ferri*, "La scienza e la vita nella XIXe secolo," Inaugural address at the New University of Brussels, in the "Devenir social" (November, 1897).

[2] I shall always remember how, as I studied seven hundred soldiers man by man in comparison with seven hundred delinquents one day, there came before me and the doctor who was present at these examinations, a soldier obviously of the type of the born-criminal, with enormous jaws, extremely developed temples, a pale and earthy skin, and a cold and ferocious physiognomy. Well knowing that persons who had been convicted of serious offenses were not admitted to the army, yet I hazarded the remark to the major that this man must be a murderer. In reply to indirect questioning, the soldier told me a few minutes later that he had served fifteen years in prison for a murder committed in his childhood. The major looked at me in astonishment and I said to myself: "I wish that the critics who have

adversaries of criminal anthropology after visiting prisons and insane asylums assert that they have not found specific characteristics among criminals; but that proves only that they have not known how to look for them; since being jurists rather than anthropologists they have neither scientific knowledge nor experience. Yet, to cite a striking example, Professor Canonico, doubtless a stranger to anthropological researches and a convinced partisan of the classical school, but free from controversial prejudices, could write the following lines in relating his rapid visit to a few prisons in Europe: "I am not a fatalist; but when I saw a number of habitual criminals of mature age assembled in the same room of the Bruchsaal, I said to myself: 'Do what one may these men will always be rogues.' One saw clearly on their faces the impress of a defect of balance in their moral faculties." [1]

§ 30. Qualitative and Quantitative Disagreements in the Data of Criminal Anthropology.

These form an objection that has received the undeserved honor of repetition in every tone and with a more or less accurate prodigality of detail. To it, on that account, a few words must be devoted, although for some time it has given way before the increasingly methodical researches of criminal anthropology. In the first place, in every natural science and especially in the biological sciences where the complexity of phenomena studied

never studied a living criminal might be here in hiding to make their reasonings and say that criminal anthropology has no foundation." In like manner, in the Tivoli House of Correction, in 1889, although the director had told us that there were there only little good-for-nothings and no juveniles sentenced for serious crimes, I pointed out to my students, among whom was Sighele, a boy who had the enormously developed canine teeth and other stigmata of degeneracy, and I declared him a born-homicide. After questioning him we learned that he was a transient inmate, that he had been sent to the "Generala" of Turin to undergo a sentence because at the age of nine years, he had killed his little brother by crushing his head in with a stone.

In Paris, at the Asylum of St. Anne, during the anthropologico-criminal Congress and in the presence of Tarde, Lacassagne, and Benedikt, I distinguished by the contour of their heads the homicides, from the thieves among the degenerates that Magnan showed us.

In the penitentiary of Civitavecchia as we were about to leave a dormitory, it was said that there was no characteristic type there to show the students, when I designated a convict of the brigand-assassin type. Upon calling him over to us, he told us somewhat reluctantly that he was "the chief of the Carbone brigands."

Dello Sbarba, "Al penitenziario di Civitavecchia," in the "Scuola positiva" (May, 1896), p. 309.

[1] *Canonico,* "Revista carceraria" (1885), p. 91.

increase in an extraordinary way, we can find series after series of qualitative and quantitative contradictions. Physiology and even anatomy, surely are positive and fertile sciences; and yet how many differences there are between observers on each point, so to speak, of their observations of fact, from the obscure problems of cerebral localization down to the modest question of the number of bones composing the human skeleton. Why should this disagreement in partial results therefore be the death sentence of criminal anthropology alone, which is no more and no less guilty than every other biological science and which is only in its beginning? It is precisely in this, as I have said elsewhere, that the customary lack of experimental sense among closet critics is shown. They argue from data supplied by facts without ever personally having verified a single fact. It can easily be understood how the good logician wishes to find the figures furnished by criminal anthropology all in coördination and in agreement, well established and symmetrical; such indeed are the indispensable conditions of every good "a priori" system. But, on the other hand, one cannot expect that the reality of facts so multifarious and complex, should show itself in each of the series of delinquents observed and in the different series compared, in regular formulation, in so many definite figures agreeing mathematically. Thus what is a defect in the eyes of the syllogistic critic becomes evidence to the naturalist that these data are not arranged according to preconceptions of the anthropologist but are precisely accurate reproductions of the multiple forms of nature, in their diversity. It is on this account that we have always asserted the necessity of avoiding unilateral views in the study of the criminal and crime and of understanding all of the most diversified manifestations, personal and real, organic and psychic, physical and social, which (unless artfully manipulated) by their nature cannot be formulated into figures which are identical and in perfect agreement with a given percentage.

§ 31. Disagreement in the Data of Anthropology More Apparent Than Real.

It often happens that the differences between the results of two observers are only apparent and may be rescinded by experiment. In this connection I should mention two defects in the method pursued by many criminal anthropologists, defects which have not been objected to by our critics, but which lead to dis-

cordances and contradictions which are not true to fact.[1] One of these defects is the measuring of skulls in order to determine the cranial capacity of criminals without knowing anything of the stature and respective ages of the subjects, whereas there is a settled connection between the different anthropological characteristics, the capacity of the skull, for instance, being definitely related to the age and especially to the stature. Again, in like manner the breadth of the jaw and of the forehead must be considered with the larger or smaller formation of the skull, *i.e.*, with the cephalic index, — and so on as I have shown in my study on homicide. Hence it is that the discordance is not effective and real but may depend on differences of stature and age for the different series of skulls studied. The second defect, of which Marro, among others, is guilty, and which leads to apparent discrepancies, is the study of criminals regardless of whether one or another of the fundamental types predominates in the series studied; that is, the criminal-born type with predominance of the biological factors or the type of the occasional delinquent with a contrary predominance of the social factors. It is, indeed, certain that if attention be paid to this and if one studies only a series of born-criminals, whatever be the crimes of which they have been convicted, the biological anomalies will be much more frequent than if a series of occasional delinquents be studied. So true is this, that in reality the legal and objective classification, such, for example, as Marro establishes for the different categories of subjects examined by him according to the quality of their crime, is not by any means the best; but it is much more important that criminal anthropologists, in accordance with subjective and psychological criteria and even in accordance with the data of relapsed criminals, should distinguish the basic differences between delinquents in whom a congenital tendency prevails and those whom the impulsion of surroundings has controlled. Finally, there are forceful instances which further show how these discrepancies disappear, especially when the serial method is applied. This is exactly what occurred in reference to cranial capacity, which, as now fixed, shows in delinquents as compared with normal men (condition of age, stature, province, etc., being equal) an unusual frequency of heads either too large or too small.

[1] On the method in criminal anthropological researches see *Ferri*, "L'Omicidio," pp. 100 *et seq.*

§ 32. Miscitation as the Basis of Criticism of the Use of Anthropological Data.

The most typical instance, however, of biased and superficial criticism directed at criminal anthropology from this standpoint is to be found in certain particular objections which proceed solely from the habit of neglecting the other elements which concur in the determination of criminal characteristics. Tarde, in formulating one of these objections, — afterwards repeated to excess and without reflection by other critics as if to prove to Tarde the truth of his observations on the contagiousness of imitation in social life, — said: "Women present some striking resemblances to the born criminal, but this does not prevent them from being impelled to crime only one fourth as frequently as men; and I might add that they are four times more often impelled towards good. They are more prognathic than men and yet (Topinard) their skulls are smaller and their brain less heavy, even with equal stature; their cerebral forms have something of the infantile and embryonic; they are less adroit, more often left-handed or ambidexterous; their feet are, if one may say so, flatter and less arched; finally, they have less muscular strength and are as completely devoid of beard as they are richly endowed with hair. Now these are so many characteristics of the criminal. Moreover, they have also improvidence and vanity, two traits that Ferri rightly indicates as dominant in criminals; again, there is the same sterility of invention; the same tendency to imitation; the same weak and limited tenacity of will. But, on the other hand, woman is eminently good and affectionate and this single difference suffices to counterbalance all of the preceding analogies. Moreover, she is attached to the traditions of her family, her religion, and her national customs and she defers to public opinion. In this she is also widely differentiated from the criminal, in spite of some superstitions which often persist in him; but in this she approximates the savage, the good savage to whom she has a much greater resemblance than to the criminal."[1] Colajanni also, after reproducing this objection with much detail, thus concludes: "Let us admit it: the sexual contradiction is the strangest of all and fittingly supplements the series of contradictions in criminal anthropology."[2] Sergi has made fine and caustic replies to all

[1] *Tarde*, "La criminalité comparée" (Paris, 1886), p. 46.
[2] *Colajanni*, "Sociologia criminale," 1, 299.

these attacks, in not only disputing the scientific accuracy of Tarde's assertions of the characteristic peculiarities of women and of the fact that the connection is found in savages, but also in calling attention to the fact that the objection has a slight basic defect in that it neglects the difference of sex as an element of comparison. His conclusion is as follows: "Woman is not a facsimile of the savage or of prehistoric man, but like her ancestors she has sexual characteristics peculiarly her own and she possesses, by heredity, the tendencies which are inherent in those characteristics. These are, as Darwin would say, secondary characteristics of sexuality which are common to savage women and civilized women and which Tarde mistakes for atavistic traits." [1] Nor is this all: it might be observed that "if woman in society supplies only an insignificant quota in the figures of crime, she does indeed fully manifest in prostitution the degeneracy peculiar to her sex"; but here again, as always, we should repeat that crime is not the effect of biological characteristics alone but is the resultant of these characteristics in coöperation with physical and social factors. Hence, while the profoundly different medium in which woman lives counterbalances the impulsion of biological factors in her, yet this does not contradict at all criminal anthropological inductions on the natural genesis of crime; for this genesis, let us once more repeat, is not so one-sided, so clean-cut, and so exclusively organic as our critics, for the convenience of controversy, persist in supposing. Colajanni makes us another objection of the same kind when he asserts that "contemporaneous man does not differ from prehistoric man in fundamental morphological characteristics, within the limits of the same race; whence the legitimate inference that physical evolution does not move in parallel lines with physico-moral evolution." [2] Here again, without going into the details of particular facts which might be used against him and which differ from the facts collected by him, the rejoinder must be made that the objection is baseless because one-sided. It is well known that organic racial traits are very stable: Phoenician skulls excavated in Apulia show the same general characteristics as those of the modern inhabitants of that region; and there are a thousand instances of the same kind. But are not the psychic traits of the race just as stable, especially those that are funda-

[1] *Sergi*, "Le degenerazioni umane" (Milan, 1889), p. 137.
[2] *Colajanni*, "Sociologia criminale," 1, 323.

mental? Frenchmen of to-day answer the psychological description that Julius Caesar gave of the Gauls, and the Germans answer the description that Tacitus gave of their ancestors;[1] and so in our own domain I have largely explained the oasis of lesser criminality in eastern Sicily as compared with western Sicily and in Apulia in comparison with neighboring regions, by the permanence of the ethnic traits both organic and psychic of the Greek elements that peopled those countries.[2] There is therefore no lack of harmony between organic evolution and psychic evolution: further, by organic evolution one should not, like Colajanni, understand exclusively the external morphological characteristics but also those which are histological and physiological. Moreover, how can one by simple reasoning reach "a legitimate inference" when we know that the most important biological elements are subject to the slightest variations, but that vice versa these slight variations produce much greater effects than much more considerable variations of the other elements. That the legs of one man should be twenty centimeters longer than those of another has very little influence on the general and psychic development of either. But when one man has as little as one cubic centimeter more brain than another man, other things being equal, there is a very considerable and quite visible influence, particularly on the psychic and social state. Again, when an hypothesis such as that of Darwin and Spencer explains nine hundred and ninety facts out of a thousand, because the ten facts are insufficiently proved, it is not permissible to resort to "the legitimate inference" that therefore a single fact is worth more than one hundred theories, although drawn from other facts. Before denying the hypothesis there should be considered whether these ten facts do not correct the hypothesis, since it often happens that they are in disagreement only with the rigid and incomplete interpretation which the critics are pleased to give to these hypotheses. In illustration I may cite another fact which I have observed in criminals and which is so essentially involved with the laws of evolution that I cannot omit mentioning it.[3] It is established that, from mammals to man and among the human species from the inferior races to the superior, there is a correlative development of the skull and face (from the eye-

[1] *Fouillée*, "La psychologie du peuple français" (Paris, Alcan, 1898).
[2] *Ferri*, "L'Omicidio," pp. 263, 264.
[3] See *Ferri*, "L'Omicidio," which deals with facts of this kind.

brows to the chin) by virtue of which, in the make-up of the head, the face decreases more and more in proportion to the size of the skull. It suffices to glance at the head of a horse and the head of a man to note that the face of the horse occupies two thirds, leaving only one third for the cranial ovoid, while in man there is about the same distance from the eyebrows to the top of the head as from the chin to the eyebrows. In savages, save for inevitable exceptions, it is well known that the development of the face is enormous in comparison with that of the skull. There is this same development in microcephalic idiots who incontestably represent atavistic return to inferior species.[1] Among civilized races and among the more intelligent and moral individuals of these races, the face becomes smaller compared with the skull and, moreover, the size of the jaws diminishes.[2] Whatever the significance of this fact may be, I have found an enormous development of the face relatively to the skull in criminals when compared with normal men.[3] Now, in the face of so eloquent a fact, isolated though it be, of what value are academic syllogisms or litanies of contradictions of detail in a particular anthropological result? Again, if Colajanni finally accepted the most striking hypothesis of criminal anthropology, namely, that crime is, as he says, "a phenomenon of psychic atavism," how can one fail to see that organic atavism corresponds to psychic atavism? Finally, above all the partial disagreements on each of the basic facts of criminal anthropology, we see the predominance of a constant and indisputable fact: namely, that all scientific observers of criminals compared with normal men, — even those (Heger, Bordier, Manouvrier, Féré, or Monti) who reject this or that conclusion of the Italian positive school, — have always found in criminals undeniable characteristics of even organic inferiority. We shall see presently the interpretation that has been given and that can be given to these anomalies; but from now on, this ultimate and conclusive agreement suffices to take away any appearance of scientific value in the specious objection that there are contradictions of detail in the various researches of criminal anthropology.

[1] One needs only to have seen one, as I did in Turin, to give up every contrary argument.

[2] See *Ferri*, "L'Omicidio," p. 180, where this fact is explained in order to destroy the doubts of Spencer as to its biological significance.

[3] See *Ferri*, "L'Omicidio," illustrations 7 and 8.

§ 33. The Presence of Criminal Traits in the Honest and in the Non-Criminal Insane.

Another very widespread objection to criminal anthropology is that anomalies, particularly organic, are not found exclusively among criminals; that they occur among honest folk, among the non-criminal insane, and among degenerates generally. This criticism is more serious than all of the preceding objections because it is more positive. Moreover, it is related to the last two objections, to be considered later, one directed to the criminal type and the other to the nature of criminality. The answer which I shall make to it should be supplemented by the answer I shall make to the other two objections. First of all, let me say that as a general rule all sciences which study life phenomena and especially those which have man as their object, whether they are physiological or psychic, are now characterized by the relative inaccuracies inseparable from the beginnings of every science. Stuart Mill, among others, has fully demonstrated that the immense variety of elements concurring to constitute a physiological or psychic phenomenon is the sole cause that makes it impossible under present conditions to calculate them with mathematical and quantitative exactness.[1] Even the psychological and social sciences will in time reach a quantitative perfection. Of this we already see the first examples. In psychology it suffices to mention the psycho-physical studies of Fechner, Weber, Delboeuf, Mosso, and others, yet they should not be taken at the full value first given them.[2] In sociology, even aside from the tentatives of Giuseppe Ferrari on "mathematics in history," we have advanced through the labors of Quételet, Guerry, Fayet, Wagner, Drobisch, Oettingen, Mayr, Messedaglia, Lombroso, Morselli, Tammeo, Lacassagne, Ferri, and others, to a more general use of the statistical method applied to the study of moral facts in society, as well as the calculation of probabilities. It is not necessary to mention the works of such authors as Whernell, Cournot, Walras, and Jevons who have applied mathematics to political economy. The fact that all this scientific movement has not yet reached a high degree of certainty does not detract from its positive value and the assurance of greater progress.

[1] *Mill*, "A System of Logic, Ratiocinative and Inductive" (London, 1843), Vol. II, Lib. VI, cap. 3.

[2] *Fechner*, "Elemente der Psychophysik" (Leipzig, 1860), "In Sachen der Psychophysik" (1887); "Revision der Hauptpunkte der Psychophysik" (Leip-

§ 34. Accumulation of Criminal Traits Necessary to Mark the Criminal.

But let us see what force there really is to the first part of this objection.

Generally there is to be found in the honest man a single one or a very few of those characteristics which are found together in every criminal, or rather in each of the criminals who form a special class, by reason of inborn and particularly serious anomalies, in the mass of criminals. Anthropologists unanimously admit that the important thing in the significance of the anomalies observed in criminals, as in the insane, is the accumulation in great or less degree of these anomalies in the same individual.[1] It should be noted that laymen often attach an undeserved importance to certain characteristics, simply because they are the most obvious. It is not unusual for one to think that he has found the criminal type in a man simply because of the bloodshot eyes, deformed mouth, uncouth beard, etc., whereas these peculiarities have no significance to the anthropologist.

§ 35. Counterbalancing of Criminal by Other Traits.

When some of the characteristics observable in criminals are found in an honest man, very often the expression of the physiognomy or the other anthropological traits immediately rectify an erroneous judgment based on first appearances.

§ 36. Variable Predominances of Parents in Offspring.

When these other corrective craniological or physiognomic elements are absent, it should be remembered that one of the laws of heredity, both organic and psychic, is the variable predominance of each of the two parents in the transmission of their traits to their offspring. It may, indeed, happen that one of the parents has transmitted the abnormal exterior forms while the

zig, 1883); *Delboeuf*, "Recherches théoriques et expérimentales sur la mésure des sensations" (Brussels, 1873); *G. E. Muller*, "Zur Grundlegung der Psychophysik: critische Beitrage" (Berlin, 1878); *Mosso*, "La circolazione del sangue nel cervello dell'uomo, ricerche sfigmografiche" (Rome, 1880); *Seppilli*, "Le basi fisiche delle funzioni mentali," in the R. F. S., II, 1. For the great contemporary movement of employing measuring processes in the study of experimental psychology, see *Binet*, "L'année psychologique" (Paris, 1894 *et seq.*), with important original monographs and a very ample bibliography.

[1] *Mingazzini*, "Il cervello in relazione ai fenomeni psichici" (Turin, 1895), p. 197. As to abnormal characteristics found in honest men, see *Lombroso*, "Uomo delinquente," I, 103.

other has transmitted the normal nervous (and hence, psychic) constitution. This is a fact scientifically determined, notwithstanding the darkness in which these studies are buried.[1] There are, however, unique and rare cases, while in the others the exception is only apparent for reasons which will now be given.

§ 37. Criminal Traits So Called Do not Necessarily Result in Crime.

One should not attribute to anthropological studies, as do laymen, the pretensions of the old phrenology, which, like part of Gall's intuitions on the relation between various cerebral organs and psychic activities, reached the exaggerated conclusion which is all that laymen have retained of them, while science, on the contrary, has condemned them.[2] The presence of such and such anomalies in criminals, does not mean that these anomalies (unless they constitute the criminal type in a striking manner) are absolutely and exclusively criminal symptoms. These are anomalies, the reaction of which may manifest itself in the life of the individual not only by crime, but by insanity, suicide, prostitution, or simply by an eccentric character or an immorality which falls short of those extreme degrees. Crime in man is not the exclusive effect of mere biological conditions: exterior circumstances, either physical or social, are needed to transform them into criminal activity.

§ 38. Influence of Circumstances in Restraining the Criminal.

It should be remembered that a man may be innocent according to the penal code, having never committed a robbery, a murder, or a criminal assault, without, on that account, being normal. In the higher classes, especially, criminal instincts may be smothered by environment (wealth, power, or the greater influence of public opinion). This is why there is a face which is, as we shall see, the inverse of the face of the occasional criminal: I mean the face of the man who is criminal-born and is yet preserved from

[1] *Ribot*, "L'hérédité psychologique," 2d ed. (Paris, 1882), pp. 181, 182, 203, 396; *Spencer*, "Essays"; *Lucas*, "Traité philosophique et physiologique de l'hérédité naturelle" (Paris, 1847–50), I, pp. 194, 219; *Sergi*, "Le degenerazioni umane," p. 27.

[2] *Lombroso*, in the "Enciclopedia medica italiana" (Vallardi, 1875), Article "Cranio," p. 193; *Verga*, "Il cranio," in the "Archivio italiano per le maladie nervose" (1882), II; *Dally*, Article "Craniologie," in the "Dictionnaire encyclopedique des Sciences médicales," Vol. XXII (Paris, 1879), p. 693; *Bastian*, "Le cerveau organe de la pensée chez l'homme et chez les animaux" (Paris, 1882), II, Ch. XXV.

crime by the favorable circumstances in which he finds himself. How many there are who have never stolen because they swim in opulence and yet, had they been born poor, would fill the prisons![1] Or again, these criminal instincts are given vent under veiled forms and thus escape the criminal code. Instead of stabbing his victim, he entraps him in perilous enterprises. Instead of being robbed on the highways, people are fleeced in the gambling of the exchanges. Instead of being raped, an unfortunate woman is seduced only to be deceived and abandoned. Side by side with legal and manifest wrongs are those which are social and hidden; and it is hard to say which are the more numerous.[2]

§ 39. Possibility of Crime Existent in a Man of Criminal Traits at All Ages.

There remain two practical and decisive considerations.

We do not know if the man who has these anthropological traits and who has hitherto been honest, will be honest the rest of his life. Statistics show that there is a predominance of certain crimes at different ages; and if, as a general rule, the criminal does not show his tendencies in early life, he may have remained honest up to a certain age, by reason of favorable circumstances (and the same may be said of insanity or suicide), but finally yields to his inborn instincts, the symptoms of which already existed in these abnormal characteristics.[3]

§ 40. Apparent Honesty in Face of Anthropological Data Often Deceptive.

But above all we do not know with certainty that the individual in whom these characteristics are noted, is really honest, as we believe him to be. It is well known that many of the most serious crimes are committed without becoming known or without the detection of the perpetrators. Furthermore, once the de-

[1] *Lombroso,* "Delinquente d'occassione," A. P. (1881), II, 3, p. 323.

[2] I shall return shortly to this assertion (already advanced at p. 103 of my 3d edition) in treating of the natural definition of crime and again in discussing Durkheim's idea on the "social normality of crime." As to the existence of latent criminals or of pseudo-honest people, I asserted it in my second edition in 1884 (p. 198) before *Maudsley,* "Remarks on Crime and Criminals," in the "Journal of Mental Sciences" (July, 1888), and *Corre,* in "Les criminels" (Paris, 1889), p. 359, were of the few who observed the same fact. It has since been frequently referred to down to the recent monographs of Pinsero, de Ferriani, d'Angiolella and the posthumous work of Poletti. Of these I shall speak presently.

[3] See a striking case in *Aly Belfadel,* "Prévision vérifiée de delinquence chez un individu du type criminel," A. P., XIX, 28.

tected delinquents are released from prison, they all mingle with society, undistinguished from honest folk by those who are ignorant of their antecedents. While there are many of them who are only occasional delinquents and who have committed only slight crimes, this is not true of all. There are therefore two categories of real delinquents who have undergone their punishment, who are able to pass for honest men and present an apparent exception, but in reality are a confirmation of the conclusions of anthropology.[1] While these facts show on the one hand that this oft-repeated objection reduces itself to a very few real exceptions and these explainable by the law of heredity, on the other hand it supplies the means of fixing from now on the generic value of the different conclusions of anthropology. Thus, when it is said that delinquents present certain abnormal characteristics, it is not meant that these must necessarily be met with in all delinquents and never met with in non-delinquents. The observation has an entirely relative value. But it is not on that account less positive or less conclusive — implying as it does a greater frequency of these characteristics in the delinquent compared with the normal man. It has also an individual value along with its collective value, in cases where an extraordinary reunion of anomalies is found in the sane individual; since in such case the probability and the plenitude of the type increase in a geometrical ratio with the accumulated characteristics. As to the second part of the objection which bears on the point that the anomalies of delinquents are also found in the non-delinquent insane and in degenerates in general, it is connected, as we shall see, with the opinion according to which congenital delinquency is only a branch of the trunk from which insanity springs, or rather, that it is nothing else than one of the numerous forms of general degeneracy. As those who contradict us admit at least the fundamental affirmation that the delinquent is more or less different physically and psychically

[1] In accordance with some statistical researches which I shall disclose elsewhere in connection with the social factors of homicide, I believe that approximately in a hundred male Italians over fifteen years of age, there are five unknown delinquents. I have calculated this figure with striking precision even in the case of the seven hundred soldiers whom I studied in comparison with seven hundred convicts. In accordance to this one readily sees with what great prudence one should accept the proportion of anthropological characteristics in the normal persons studied; for instance in the hospitals, poor houses, etc., where there are really five per cent. and perhaps ten per cent. of unknown delinquents. The same conclusions are found in *Laurent*, "Les habitués des prisons" (Lyon, 1890), p. 331.

from honest folk, I reserve this point for the examination which I shall make of the last objection.

§ 41. Historical and Anthropological Indetermination of Crime.

The historical and anthropological indetermination of crime, and hence of the criminal, is another capital objection directed from various quarters against the indications of criminal anthropology. How, they say, can you fix the characteristics of the delinquent, unless you begin by telling us what crime is aside from the penal laws? Given the enormous variations that the differences of social evolution have imposed and do impose on human acts in different epochs and countries, so that acts to-day declared the most criminal, such as parricide, have been and are permitted and even recognized as obligatory in other times and places; while, vice versa, some acts which are not now classed as criminal, such as magic or blasphemy, were the most serious delicts in the Europe of the Middle Ages and still are among many savages; given this historical indetermination of crime, must not the anthropological characteristics of delinquents vary from one epoch to another, from one place to another? And in prehistoric or savage humanity, where murderers were not delinquents, should not the criminal marks be absent? Or, indeed, vice versa, did the magicians and heretics of the Middle Ages have these characteristics and lose them only when the penal laws became more civilized?

This objection can be understood when it comes from critics hostile to the experimental method, who always judge positive data according to their abstract and traditional syllogisms; but it was not to be expected from critics who understand how to follow the positive method, like ourselves, and who approve the scientific trend of criminal sociology. The objection, like so many others, springs from the incomplete and unilateral idea which the critics of criminal anthropology form of the new doctrines and which, owing to its convenience in controversy, they have been unwilling to renounce. This unilateral idea is, that we maintain crime to be exclusively the product of anthropological factors and not of physical and social factors as well. And yet, for my part, ever since the first edition of this work (1881), I have insisted so strongly and so often on the indissoluble association of the three orders of natural factors of criminality, that it seems to me our critics should no longer stop their ears to our

fundamental conclusion. Neglecting for the moment the physical factors of crime in order to simplify the problem and because they are not directly involved in this special argument, we can once more repeat that crime in general is the resultant of combined biological and social factors, and that the reciprocal influence of biological and social factors is different for each of the crimes, not only in their different forms of homicide, robbery, and rape, but also for the varieties of each criminal species (homicide committed from passion, or for the purpose of robbery, or from insanity, or for revenge).

Thus social factors predominate in crimes against property; biological factors in crimes against the person; although both classes of factors concur always in the natural determination of every crime. If we take robbery as an example, it is very evident that the influence of the several factors is different in the diverse varieties of delinquents who commit it. The influence of the social medium is greatest in simple thefts committed through occasion or by acquired habit. It is less in those robberies which are accompanied by violence to the person, where there is a predominance of the organic or psychic temperament of the delinquent. This being the case, let us then begin by replying that the characteristics solely organic noted by criminal anthropology in delinquents are much more striking and much more frequent in these fundamental forms of criminality which are less subject to the variations of the social medium. Of these forms, the most important are, as I have said elsewhere, homicide and robbery.

Now, in the first place, it is beyond dispute that, at least in the historical evolution of humanity, homicide and robbery which are superlatively anti-social, have always been considered as crimes, whatever may have been the legal criteria invoked for their punishments.[1]

§ 42. Indetermination of Crime not All-Inclusive.

The historical indetermination of crime, therefore, should not be affirmed in a general and absolute manner for all crimes. It applies especially to those forms of crime (evolutionary criminality) which, as we shall see presently, are the special more or less

[1] It is strange, for instance, that *Legrain*, in "La médicine légale du dégénéré," A. A. C. (Jan. 1894), in order to criticise certain inductions of criminal anthropology, should say: "to speak of the criminal-born amounts to saying that one is born with aptitudes for the commission of acts *on the value of which the whole world is*

transitory product of particular social conditions. It applies only to the crimes and delinquents where the influence of anthropological factors is less and, hence, where their presence is less obvious and less important. On the contrary, in fundamental crimes (atavic or anti-human criminality), which, under one name or another are suppressed more or less by men either collectively or individually but are reproduced in every phase of human evolution, there is no reason to believe that their perpetrators, if subjected to examination, would not show the most characteristic marks indicated by anthropology as found in contemporary criminals. To cite actual proof, Lombroso noted in twelve skulls of delinquents of the Middle Ages, the same anomalies as shown by the skulls of modern criminals. For instance, the enormous development of the jaws wherein, as I have demonstrated, one should note a characteristic mark of homicides committed through anti-human fury (revenge, ferocity, or cupidity), being produced by the predominance of egotistical functions and instincts and manifesting aggressive and violent tendencies, will be found in contemporary delinquents (I speak of the sanguinary kind) as well as in the men of the Middle Ages and in savages. And this, notwithstanding that violent homicide has been known and punished in many different ways in the different phases of social evolution. The only difference is that the great development of the jaws, while the general rule among savage peoples (and hence there is no well-defined criminal type among them), becomes an exception (through atavism or through pathology) among civilized peoples. From this comes the teratological distinction of a criminal type among the latter.

§ 43. Connotation of Crime Changes; Not so Criminality.

This is not all: Even should crimes change absolutely from one phase of social evolution to another, it would be an equivocation to seek, for instance, in the savage parricide through filial duty, the organic and psychic anomalies that we find among the parricides of civilized countries. It is the personal motive of human acts, not the name or legal definition, that is of value in criminal anthropology. The delinquent in his typical form of the born-

disputing." How so? We have never dreamed of speaking of the criminal-born in connection with debatable crime of purely political or police creation, but who will deny, for instance, that murder with violation is not a crime, that is an anti-human and anti-social act?

delinquent is, for the criminal anthropologist, an individual with *anti-social* instincts.[1]

§ 44. The Social Environment Gives the Form to Crime Which Has its Base in the Biological Factor.[2]

Human social evolution is not, after all, as rapid and unstable as the combinations of a moving kaleidoscope. If we consider homicide, robbery, rape, or forgery, we will find that from the Roman Law to our own day, a period of about twenty centuries, the moral, social, and legal conceptions of these crimes are fundamentally the same, whatever may have been the supervening changes in the forms of legal and social sanction, opposed to them. Sentiments which are the most energetic determinants of human action change much less slowly than ideas, both in time and space. Thus (a new confirmation of fact), we encounter in the effigies of the more cruel and unbalanced Roman emperors (as proved by Mayor and Lombroso) the characteristic marks appropriate to the criminals and degenerates of to-day. Be this as it may, our conclusion should always be that it is of very little importance to us to know what anomalies were present in the criminals of ten or twelve thousand years ago, or even that they are those of contemporary savages, for we are dealing with criminal sociology for the civilized countries of our own times and the near future, without any metaphysical pretension of formulating absolute and eternal laws.

[1] V. Chap. III, *post*, where I will explain the ulterior distinction between atavic criminality (anti-human or anti-social in the full sense) and evolutionary criminality (anti-social in a restricted and political sense).

[2] The following recent authors are in accord with this thought: *Tarde*, "Bribes de statistique Américaine," in the "Archivio anthropologica criminale" (November, 1892), p. 692: he says the social factors are the directive causes and the anthropological and physical factors are the impulsive causes; *Dallemagne*, "Étiologie foncionnelle du crime," in the A. C. (Brussels, 1893), p. 141; *Pelmann*, "Wissenschaft und criminalität," in the "Prager Med. Woch." (1895), and A. P. XVII, p. 317; *Orchanski*, "Les criminels russes et la théorie C. Lombroso," in the A. P. (1898), IX, 17.

Even among the critics of criminal anthropology, Näcke has recently been forced to declare that in the origin of crime, no less importance should be given to the individual factors than to the conditions of the medium.

Näcke, "Die criminal anthropologie, ihre ferneren Aufgaben und Verhaltniss zur Psychiatrie" (1894), general considerations on criminal psychiatry, in the A. C. A. C. (Geneva, 1897), p. 8. He there says: "I now share the opinion of those who believe that the individual motive is the principal thing." On the same point, see *Ottolenghi*, "Il fattore antropologico e l'ambiente nelle questioni sociali," in the "Rivista di Sociologia" (February, 1895), p. 132.

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§ 45. "Mala Prohibita" and "Mala in Se."

The objection has another aspect which disputes the very foundation of criminal anthropology, by declaring the researches unjustified unless, aside from the variable penal laws, precise limits are set between crimes and normal action, according to natural and social criteria. Garofalo found it necessary to meet this difficulty with his definition of "natural crime" as distinct from "legal crime." "This," he writes, "is in order that one may know what delinquents the naturalist speaks of when he gives his connotation of crime. In a word, it is *natural crime* that must be established." [1] He thus takes up under another aspect the distinction between natural crimes and those of "purely political creation," as Del Lungo called them. Romagnosi had indicated this distinction in speaking of "*natural crimes* and *made crimes* ('factices')," and in recalling that the Romans distinguished "acts which are considered crimes because the moral sense and right conscience reprobate them ('natura turpia sunt'), from those which the special circumstances of a people require to be prohibited for the common safety [2] ('civiliter et quasi more civitatis')." This distinction is also established in Anglo-Saxon law between "common-law crimes" ("mala in se") and "statutory crimes" ("mala prohibita").[3] Garofalo's definition was, however, an original and happy attempt, although for my part, as Fioretti had already remarked and as I have said elsewhere, I do not feel the antecedent necessity for such a definition. In my opinion, a definition with which metaphysicians and classical jurists ever love to begin, can on the contrary only be the ultimate synthesis. It should, therefore, come at the end and not at the beginning of the researches of criminal sociology.[4] And this is not only because the general reasons of the positive method require it;

[1] *Garofalo*, "Criminologia", 2d ed. (Turin, 1891), p. 2.

[2] *Romagnosi*, "Genesi del diritto penali." § 1545; *Capobianco*, "Il diritto penale di Roma in con fronto al diritto penale vigente e alle teorie della scuola positiva" (Florence, 1894), p. 163.

[3] *Holmes*, "The Common Law" (Boston, 1881); *Harris'* "Principles of the Criminal Law" (New ed. London, 1881–9).

[4] *Hamon*, "Déterminisme et responsibilité" (Paris, 1898), p. 66, on the contrary, thinks that an antecedent (I was about to say "a priori") definition is necessary, in order that all may understand the precise object of criminology. But the example that he cites; namely, that all chemists call bodies composed of an acid and a base salts, only confirms my thought. Chemists reached agreement on this definition of salts, not before, but after long analytical labors carried on with the existence of this definition.

but also because the difficulty raised by opponents and combated by Garofalo is not serious. Tarde, in speaking of a work of Beausire, who attributes great importance to the new ideas and who concerns himself also with Garofalo's definition of natural crime, declares that to him crime is always "a wilful violation (he does not say a free violation) of law." [1]

§ 46. Juridical Crime and the Criminal from a Sociological Point of View.

Now this is remaining in the old circle where crime is what the legislator punishes; and one thus only perpetuates (and this was logical in the classical school) that most ancient principle, according to which delict is what the "divinity" forbids. There was simply a substitution of the "Lord's anointed" for the "divinity," and finally, with progressive socialization this became "the legislator." It is therefore necessary to make the essential difference clear between the anthropologico-criminal viewpoint and the sociologico-criminal viewpoint.

In the eyes of the criminal anthropologist, he who slays for gain, and he who urges his victim to suicide in order to come into an inheritance, are both equally criminal. His object is the study of the organic and psychic constitution of each, in so far as this constitution is abnormal. Quite different is the criminal sociologist's point of view relative to the legal and social measures which can be derived from this anthropological data and which we shall take up in the proper time and place. For we should not by a mere reasoning process rush into the conclusion to which some critics wish to force us, namely, that according to our thesis it would be necessary to imprison all those who show abnormal biological characteristics. Let us repeat again that crime is also the effect of physical and social as well as biological factors. And, as the biological condition does not of itself suffice to cause the commission of a crime (it can be neutralized by the action of a favorable medium), society may devote itself to these biological anomalies in the pedagogical and hygienic order, but never in the order of legal repression. In the same way that insanity gives rise socially to defensive measures only when manifested by mania, so, also, in a social sense, criminal tendencies, even when revealed by physiognomic and psychic traits, cannot be the occasion for repressive measures until manifested in some concrete

[1] *Tarde*, on *Beausire's* "Les Principes de droit," A. A. C. (July, 1888), pp. 387–389.

form, by an aggressive act, — in a crime either attempted or accomplished. For the legislator as well as for the judge and public sentiment, *a born-criminal may be legally an honest man.* And this not so much because he belongs to the band of those who are studied as "artful and fortunate delinquents," that is, those who are able by cunning and the abuse of power to escape the penalty of the law which they have actually violated;[1] it is principally because one may never have violated the penal code and be none-the-less morally and socially a rascal often endowed with brilliant faculties, but certainly worse than many convicts. As epilepsy has its psychic equivalents which replace its muscular convulsions, so delinquency has social equivalents which in the more cultivated classes replace its brutal, atavic, violent forms with anti-social or immoral forms of activity which circumvent the law without a frontal attack.[2] Thus rape becomes seduction; the prostitute becomes the elegant adulteress and the "demi-vierge"; the robber becomes the usurer and the Panama stock-jobber; the yeggman becomes the duelist or the colonial or warlike adventurer.

§ 47. The Proper Subject of Criminal Anthropology.

This, in conclusion, is why this prejudiced objection offered to criminal anthropology is not maintainable; not alone because for the greater part of the time this science studies the authors of crimes which I have called fundamental and relatively constant,— homicides, thieves, assassins, and individuals guilty of assault and rape, — but because the fact remains that the proper subject of criminal anthropology is the *anti-social individual* in his *tendencies* and in his *activity.* Further, it is evident that (in the absence of precise limits, anthropologically and socially speaking, between criminals and honest folk) the new researches, by establishing the presence or absence of abnormal characteristics in the different authors of all the crimes punished in a given penal code, supply the criminal sociologist with elements much more positive than juridical syllogisms, demanding measures and reforms conformable to the results of criminal anthropology combined with the study of the physical and social factors of crime.

[1] *Ferriani,* "Delinquenti scaltri e fortunati" (Rome, 1897); *Luisa Anzoletti,* "Gliasteroidi della delinquenza," in the "Revista internazionale di science sociale" (April, 1897), p. 541; *Tarde,* "Les transformations de l'impunité," in the A. C. C. (15 November, 1898).

[2] *Angiolella,* "Gli equivalenti della criminalità," A. P. (1889), XX, Fasc. I.

§ 48. Sociological Definition of Crime.

As to the sociological definition of crime in a naturalistic sense, as I shall have no other occasion to deal with it, I will say in passing that the definition of Garofalo, original and happy as it is, does not seem to me to be complete. In saying that natural crime is the "violation of the fundamental altruistic sentiments of pity and of probity in the average measure in which they occur in civilized humanity, by acts hurtful to the collectivity," only one phase of the criminal phenomenon is presented, that is, its opposition to certain general sentiments. It is a fundamental but an incomplete truth, failing as it does, to consider many other sentiments such as modesty, religion, and patriotism. And further, these very sentiments of pity and probity in their turn are but the hereditary and changeable effects of the social conditions of existence in accordance with the different phases of human evolution. As early as the first and second editions of this work, I placed the positive criterion of natural criminality in these conditions of social existence as well as in the social or anti-social motives which determine the act.

§ 49. Criticism of This Sociological Definition of Crime; Harmless Acts Held Criminal.

An eminent sociologist has offered two objections to this fundamental conception, — objections not drawn from fallen syllogistic verbalism, but of a positive kind. We give, he says, an exaggerated part to calculation and reflection in directing social evolution, because there are many prohibitions of fact which do not at all affect the conditions of individual or social existence. How, for instance, can there be any social danger in the fact of touching an object which is taboo or of eating certain meats? [1] It is easy to reply that, on the contrary, the criterion of the defense of the conditions of existence concedes a great part to the social instinct in the interdiction of certain facts which, like the two acts above-mentioned, may seem inoffensive in an advanced phase of social evolution where they are but mere survivals, but which are responsive to obvious social necessities in primitive phases and difficult conditions of existence (islands, for example) or of hygiene (hot climates) imposing a punishment which in other times and places becomes absurd.

[1] *Durkheim*, "Division du travail social" (Paris, Alcan, 1893), p. 75.

§ 50. Criticism of This Sociological Definition of Crime; Inequality of Penalty.

Our attention is called to the fact that certain acts more dangerous to the conditions of social life (for instance, bankruptcy, as compared with homicide) are less severely punished or even not at all. To that we reply: Aside from the case where the slayer (for instance when there has been provocation) may be less severely punished than the fraudulent bankrupt, the criterion of social gravity does not consist in the material objective damage but primarily in the offensive power of the agent. This is precisely what the positive school believes, while the classical school, spiritualistic though it be, materializes penal justice too much by proportioning the penalty to the material consequences of the deed. The foundation of natural criminality is, therefore, the attempted or consummated attack upon the conditions of individual and social existence. Uniting certain elements put in evidence by Garofalo, by myself, and by Liszt, and reproducing almost identically the terms used by Berenini,[1] Colajanni finally gives a definition of natural crime which seems to me positive and complete: "Punishable acts (delicts) are those which, determined by individual and anti-social motives, disturb the conditions of existence and shock the average morality of a given people at a given moment." [2] Yet a multitude of anti-social and immoral acts do not, on that sole account, enter into the number of the crimes designated by the law as punishable. And it may happen that punishment may not be the most appropriate social remedy for those which do so enter. That is, we impinge here upon the distinction between civil and criminal law, between prevention and repression, a subject which I shall take up in treating of responsibility.[3] Without passing in review here all of the definitions which have been given, and having clearly indicated above what my opinion is, I will consider only three typical definitions; the first, Proal's eclectic; the second, Durkheim's sociological; and the third, Bahar's biological definition.

[1] *Berenini*, "Offese e diffese" (Parma, 1886), Vol. I, p. 39.

[2] *Colajanni*, "Sociologia criminale," I, p. 64.

[3] See the Italian editions, where this subject, omitted by Ferri in the later French edition, was inserted.

§ 51. Eclectic Definition of Crime; Proal.

Proal, like many other eclectics, starting with the idea of establishing the substance of crime aside from and transcendant to all positive penal laws, does not in reality emerge from the criteria of spiritualism or juridico-traditional philosophy. He takes up the idea of Pellegrino Rossi, according to whom crime is "the violation of a duty," and he defines it as "the violation of a social duty imposed for the preservation of society," which is the definition contained in the first article of the Penal Code of Neufchatel: "Crime is the violation of the duties imposed by the law in the interest of social order." [1] This definition is equivocal: either there is question of a "social duty" not enforced by political law, and in that case it is a more vague expression than that antisocial quality in the act and its motives which constitutes the nucleus of our definition; or, else, there is question of a social duty strengthened by the sanction of the penal law and in that event it lapses again into the empirical conception of the jurisconsults.

§ 52. Durkheim's Definition of Crime.

Durkheim, who is the most original and the most genuine positivist (in the larger sense and not that employed by Compte) of contemporary French sociologists, after repeating with us that Garofalo's definition is incomplete, finally says: "An act is criminal when it wounds the vigorous and definite (?) states of the collective conscience." If we have attacked the preceding formula for incompleteness, this with its lack of precision is far from completing it. And further, in Durkheim's sociological system, it is worthless, for he, with his accurate conception that sociological facts should be examined objectively (meaning by sociological fact "every rule of conduct to which is attached a sanction spread through the collective conscience"), concludes that all crimes, even those which offend no collective sentiment, belong in different degrees to the same category and that, for this reason, "whatever be its varieties, crime is ever *essentially the same*." [2] While in an exclusively sociologico-juridical domain, that may be exact (and I have always maintained that from the juridico-social point of view there is only a difference of degree between crimes

[1] *Proal*, "Le crime et la peine" (Paris, Alcan, 1894), p. 500.

[2] *Durkheim*, "De la division du travail social," pp. 27, 77, 85, 88; "Règles de la méthode sociologique," p. 51.

and contraventions of police), in the anthropologico-social domain, it amounts to a simultaneous denial and assertion of the necessity of scientific analysis. It is the same thing as if a chemist should say that all composite bodies are composite in different degrees and that it is therefore futile to seek to distinguish or classify their elements. Durkheim is right, however, in his attack on those authors who, like Bastien and Tarde, dabble in social psychologism and say that social facts are the effect and reaction of psychic facts and that they do not in themselves possess special and objective conditions of existence acting and reacting on psychic facts; but he is wrong when he forgets (as do a number of theoretical socialists, aside from the sociologists) that social facts can only possess a relatively autonomous existence; because society has its base and its roots in the biological facts of anthropology.

§ 53. Biological Definition of Crime; Bahar.

According to Bahar "Crime is the expression of the impotence of the individual to renounce anthropophagy (cannibalism, direct or indirect attacks on human life); it consists in satisfying our instincts and passions on our fellow man instead of exacting the satisfaction of our needs from material things." [1] It is obvious that, by a defect contrary to that of Durkheim's, crime is here considered only under an exclusively biological aspect; whereas we have always maintained (and Manouvrier [2] is in error in supporting this idea in opposition to the positivist doctrines) that crime is a social phenomenon, because without life in society it is inconceivable either in animals or in men. While Manouvrier concludes that, for that reason, crime is the exclusive product of social factors (because it is a social phenomenon); we contend, in partial disagreement with both Manouvrier and Bahar, that while crime is a social phenomenon, it is nevertheless also the biological manifestation of one or many individuals, and, hence, it is error to attribute its origin exclusively to sociological or biological causes since these two indissolubly interwoven causes concur in producing it.

[1] *Bahar*, "Une nouvelle definition du crime basée sur la science biologique," in "Revue penitentiaire" (1895), p. 739.

[2] *Manouvrier*, "Les aptitudes et les actes," in the "Bulletin de la Société d'anthropologie" (Paris, 1809), and "l'Ere nouvelle" (October, 1893), reiterated in the "Genese normale due crime," B. S. A. (15 September, 1893, and March, 1894).

§ 54. Sociological and Biological Bases of Crime.

Exactly for that reason, I have called crime a natural and social phenomenon, which is not a mere verbal juxtaposition of two heterogeneous qualities, as Carnevale [1] thought because he was unable to see summed up in this expression the fundamental induction of modern science, — an induction whereby every order of complex and higher phenomena, far from excluding the underlying order of more simple phenomena, embraces it and is rooted in it, according to the law of natural development formulated by Ardigò: namely, that every later and more distinct phase follows, without destroying or eliminating, preceding and indistinct phases of cosmic, biological, and sociological evolution.[2] Hence there can be no social fact without it being at the same time a biological fact, with something additional; and this in turn is impossible unless it is at the same time a physico-chemical fact, with something added; and this latter is a cosmo-telluric fact, with something additional. The *something additional* constitutes the object and justification of the special science for each order of facts; but the *very much more* which constitutes its base and makes it possible, should not be forgotten. None of the definitions which have been given for crime responds to this fundamental induction on the naturalness and continuity of the phenomena of the universe, in the gradation of their increasingly complex orders, from cosmic life to physico-chemical and to biologico-social life. For, even when the definitions are exact in themselves, they throw light on only some element or aspect of the criminal phenomenon without giving a complete idea of it. The one which does give a complete idea of it and which is responsive to this induction, is Berenini's definition and it is also mine. It responds not only to the exigencies of science but also of practicability as we shall see later. That criminal science, in its definition of crime, should have thus reached a fertile and decisive conclusion results from the following consideration which is quite essential. In the same way that an evolution and integration of fundamental doctrines have taken place in sociology where determinism and scientific explanation of social facts first appeared under the most superficial conditions, because most apparent even to the sense

[1] *Carnevale*, "Il naturalismo nel diritto criminale," in the "Giustizia penale," 1895, p. 575.

[2] *Ardigo*, "La formazione naturale," Vol. II, of his "Opere" (Padua, 1887).

of the community (according to Compte, *ideas*), and then under conditions less superficial (according to Spencer the sentiments from which ideas germinate), and finally in the really fundamental conditions of individual and collective life (according to Marx, the *needs*, from which spring sentiments and ideas); so also, in the determination of crime and the criminal as the object of criminal anthropology, a beginning was made by pointing out the most superficial and apparent conditions (according to Tarde, Vaccaro, and Proal, the interdiction provided by the law, which is really an intellectual operation, a manifestition of ideas); then determinants of this interdiction were pointed out (according to Garofalo, Durkheim, and Severi, the sentiments); but finally, it is necessary to recognize in the condition of existence the fundamental determinant from which spring both sentiments and ideas.

§ 55. Distinction Between Anti-Human and Anti-Social Criminality.

And since, as I have indicated several times, these conditions of existence are individual and social manifestations, we find here the root of the basic distinction between atavic or anti-human criminality and evolutionary or (in the strict sense of the word) anti-social criminality,[1] and which we may again term bio-social criminality, when it compromises also the conditions of individual existence (for instance, murder, assault, rape, and robbery), and social criminality, when it concerns only the conditions of collective existence (for instance, political outbreaks and controventions).[2] The characteristic elements of natural crime are the

[1] V. Cap. III, *Post.*

[2] In two recent articles, *Tarde* has again taken up the notion of crime, "Problèmes de criminalité," A. A. C. (July, 1898), and "Qu' est-ce que le crime?" R. P. (October, 1898). But, while criticising the definitions proposed by Blocq and Onanoff, Garofalo and Colajanni, he proposes nothing new. He contents himself with a few syllogistic variations of his habitual theme of imitation and imitability and in reproducing two of my ideas, asserting that the true natural crimes are homicide and theft, adding (as I did in "Justice pénale" [Brussels, 1898], pp. 9–10) that morality extends ("s'étend") more than it changes ("se transforme"), because the notion of "one's neighbor," against whom immoral, criminal, and, hence punishable acts are committed, extends progressively from the family to the clan, tribe, nation, and humanity.

In the notion of crime, Tarde notices primarily the two psycho-sociological criteria of alarm and indignation. He then devotes himself, as is his habit, to algebraic combinations of the crimes which alarm more than outrage ("indignent"), which outrage more than alarm, or which both alarm and outrage in the same degree.

But the phenomenon of indignation is evidently bound to become attenuated and disappear with the spread of the conviction (already established in the case

anti-social quality of the determining motives and the attempt made upon the conditions of existence (individual or social), which imply the element of offense to the average morality of a given collective group. When all of these elements are united, we have the atavic forms of anti-human criminality; when the first (and hence the last) is lacking, we have forms of evolutionary or politico-social criminality.

In the meantime, as a conclusion, we have demonstrated that criminal anthropology, whether in studying the authors of fundamental crimes unanimously so considered by all civilized peoples for twenty centuries, or in relying on the natural elements of anti-social acts, possesses a well marked field of its own, of which it furnishes the counterproof of precision (not in an absolute way but in the measure proper to all natural sciences), when it establishes the want of organic and psychic anomalies in "pseudo-criminals," either in those who commit apparently criminal acts, obeying social and legitimate motives or under psychic conditions which are not pathological but exceptional and transitory, or in those who commit acts, which the law punishes but which do not offend the general sentiment of the community.

§ 56. The Existence of an Anthropological Criminal Type.

The existence of an anthropological criminal type is the conclusion that most shocks the mental habits and illusions of a more or less disguised spiritualism. It is also combated with the greatest persistence, but with the most insufficient and least varied arguments, by the adversaries of criminal anthropology. Topinard goes so far as to dispute the accuracy of the word "type" as used by us.[1] But as Lombroso answered him, and

of the insane who were once hated and dishonored) that crime also is a malady independent of the free will of the individual. As to the alarm, which corresponds to the positive element we have indicated in the attempt made upon the conditions of individual or social life, Tarde gives an erroneous analysis because, habitually seeking to reduce everything to imitation, he begins (R. P., p. 343) with the statement "that all collective conscience is formed from ideas which are *at first individual* and are propagated and generalized and then transmitted by tradition and hereditary imitation." It is clear, however, that the collective conscience is formed simultaneously, or very nearly so, in the individuals composing the group, under the suggestion or pressure of the conditions of social existence (save in exceptional cases, and, even there, thanks to the predisposition of these conditions of collective life), and that it is not an idea born in the brain of an individual "and then propagating itself," like the waves of a pond when a stone is thrown into it.

[1] *Topinard*, "L'anthropologie criminelle," in the "Revue d'anthropologie," Nov. 15, 1887.

Topinard himself wrote,[1] if type means "a sum of distinctive characteristics, a sort of average, which Gratiolet called a synthetic impression," and Saint-Hilaire defines as a sort of fixed point and common center around which the differences are but deviations in different directions, we use the phrase in its clear and precise sense.[2] This is true for the additional reason that, as Broca says, "while the type is the sum of characteristics, in relation to the group which it characterizes, it is also the sum of the most striking and most often repeated traits." The consequence is that not only in criminal anthropology, but even in general anthropology, individuals do not all present a clean-cut and complete type. It is purer in some than in others; thus, for instance, among the Hebrews in comparison with Aryans, or among the Germans in comparison with Italians. In like manner, if we visit a prison and restrict ourselves for instance to murderers (whom I have studied and of whom I can speak not only from knowledge acquired from books, which is always incomplete, but from personal experience) we can easily distinguish in the multitude of convicts twenty, thirty or even fifty very marked types of individuals who (as I have proved in my visit to prisons) must have been sentenced for shedding blood. This fact suffices to overturn all of the reasonings of adversaries who have fixed in their minds an abstract image of criminals but who have never studied the living reality.[3]

§ 57. Physiognomy Most Important in Determining a Criminal.

I should, however, point out in this connection that the anthropological criminal type results, indeed, from a mass of organic characteristics but that the decisive marks are the lines and expressions of the physiognomy. The anomalies of the structure and osseous form of the cranium and of the body constitute the com-

[1] *Topinard*, "Elements d'anthropologie générale" (Paris, 1885), p. 191.

[2] *Lombroso*, "Prefazione alla Vedizione" (Turin, 1897), I, VI.

[3] Let it not be said that in entering a prison we already have fore-knowledge that we have to do with criminals. For not only has the objection no force in view of the fact that it is possible by external characteristics alone to distinguish the assassins, for instance, from all the other criminals; but also because, even in the study of normal persons, I have had a striking experience. I have already referred to my examination of soldiers, one by one, where a single one presented the very clean-cut type of the murderer (retreating forehead, enormous jaws, cold expression, earthy pallor, thin lips). After expressing my opinion to the military surgeon who accompanied me, I heard its confirmation by the soldier himself when he said that he had been convicted of a murder committed in his infancy.

plement of the central nucleus which is the face. And there again certain traits are, according to my experience, at least, more characteristic than others, viz: the eyes and the jaw. By these two features, especially in well-marked cases, I am able to distinguish the sanguinary delinquent from every other. Thus the simple thief, who uses cunning but avoids bloodshed and violence, can be distinguished from the armed robber who in case of necessity does not shrink from murder and who, in spite of the similarity of crime and motive, constitutes an anthropological type very different from that of the simple thief. I do not pretend however that other observers like Lombroso and Marro cannot distinguish (by means of characteristics quite reliable and convincing out of their wider experience) the authors of rapes, typical thieves, and many other cases. What I insist upon is the predominant value of the face in the diagnosis of the criminal type, since by anomalies of the skull and skeleton alone, one can only distinguish the degenerate or the abnormal man in general from the normal, but cannot by these indications alone distinguish the criminal from other degenerates.[1]

§ 58. Objections to the Determination of a Criminal Type.

Naturally the obvious types are in the minority in every series of delinquents. There are two reasons for this, which give an

[1] *Sergi*, "Le degenerazioni umane," p. 116, while asserting from his own experiences, the existence of a criminal type, remarks that one should say rather "criminal physiognomy," as Lombroso himself often uses that expression in the sense of type. Nevertheless, Sergi makes an inexact observation in this connection in speaking of the data of Marro on the authors of assaults ("blessures," "feriture"), who presented to him (as to me) less distinct characteristics than those of murderers. "Did he (he says) who has simply inflicted a wound stop at that, either because he did not wish to sink his poignard deeper or because he only wished to pierce the arm and not the intestines or heart? No: the author of a wound is an assassin who did not succeed in killing the man he stabbed and he should specifically have the marks of the assassin." And yet he has not these marks, and it is natural that he should not have them, because the author of a wound, if not distinguishable from homicides, is profoundly distinguishable in the generality of cases from the *assassin*, for the latter is, as a general rule, a born-homicide while the other is a homicide by occasion if he be not at most simply a violent man who strikes without murderous intent in a quarrel, or while gambling, or when drunk, etc.; and that is why he is less abnormal than the born-assassin.

Apropos of the criminal type, *Virgilio*, "Passanante e la natura morbosa del delitto" (Rome, 1888), pp. 61, 62, 63, 125 also remarks that an anthropometrical type of criminal does not exist (and no one, as far as I know, has asserted that it does) in the sense that the anthropometrical data alone could suffice in its determination; but he acknowledges and explicitly asserts the existence of the criminal type based in anomalies of conformation and physiognomic characteristics.

opportunity for reply to the principal logical objections that are raised against the existence of the criminal type: 1st: It is said that as the type is the sum of characteristics and as crime is not exclusively the effect of biological factors, it is natural that in a great many individuals these characteristics, either as the consequence of other biological influences, such as the central nervous influences in opposition to the external conformation, or as the effect of environment, may not be accumulated and, hence, present an indistinct type. In this very case, in reply, I repeat, less evidence is not the same as less existence and is only the effect of other disturbing causes. 2d: It is objected that the criminal type is not met with, in the same frequency in all the anthropological categories of born-criminals. Now, whilst in criminals by occasion or by the frenzy of passion, who are at the opposite extreme, the anthropological criminal type either does not exist or is met with less often precisely because in them crime is determined in a lesser proportion by the biological factor and determined in a greater proportion by the action of the physical and social medium, as, for example, in the three typical degrees of the man who has simply inflicted wounds (in a quarrel and without specific intent to kill), of the homicide by occasion, and of the assassin by congenital tendency. The specious objections raised against the existence of the criminal type are reducible principally to the statement that the percentage of each of the critical and physiognomic characteristics is slight and almost always below fifty per cent. so that it does not prove the existence of the type which ought to result from say a proportion of seventy, eighty, or ninety per cent.

And if Lombroso himself says that a criminal type is observed in only forty cases out of a hundred, how can one assert its reality? Would one say brachycephalic type, if sixty per cent. of the subjects examined were dolicocephalic? This is only an equivocation and it comes from forgetting that in the mass of criminals there is a great number who are only criminal by occasion, who do not present a well-defined criminal type, and who, in a few cases only, do show it in an attenuated form (such as those who have shed blood, who have inflicted blows and knife wounds, and homicides by occasion as compared with assassins). Hence the type is in fact in a minority, if one observes the whole series of all classes of delinquents. But if one should examine a hundred born-assassins on the one hand, and the same number of

simple rogues on the other, it is certain that the criminal type of the murderer would be found almost without exception among the first and never among the second, unless these were murderous rogues — something rarely encountered. Of this I have given some proofs in establishing the greater frequency of anomalies in a series of recidivists compared with a series of non-recidivists born in the same provinces. It must be conceded that Lombroso himself has to some extent fallen into this mistake; and really, if he had more faithfully discriminated among the categories of criminals he studied, he would have obtained results much more convincing and harmonious than those admittedly striking ones which he has published. This is certainly the most fruitful task that the criminal anthropologist can henceforth take up, because science itself is obedient to the evolutive law of successive differentiations arising from an anterior state of indistinct homogeneity. In truth, when homogeneous categories of criminals have been studied, the results have been much more significant. Thus Penta, having examined among galley convicts four hundred "dangerous criminals," who therefore belonged to the category of hereditary delinquents, found that only three per cent. of the subjects were free from anomalies while ninety-four per cent. presented three or more anomalies united.[1] Moreover, the percentage figures are incontestably reinforced by the following fact: assuming that, were it only once in a thousand times, I could tell you first what are in my opinion the characteristics, especially of face and skull, which denote the born-murderer and that I then in a prison could point out an individual possessed of them who had been convicted of murder, this fact alone would suffice, against all of the quibbles of academic critics, to demonstrate the existence of the criminal type. Now, I repeat, that I have had dozens of experiences of this kind of which I am ready to make as many more tests as may be desired; and this argument will be the most persuasive, as it already is, with more or less accuracy, for the judges in their courts, and for the police in the detection of the criminal in society.

[1] *Penta*, "Le degenerazioni criminali," in the "Revista d'igiene," 1890.

§ 59. Objection Based on the Alleged Development of the Thief into the Murderer.

In this connection I recall also an objection that Dubuisson [1] first, and afterwards Joly [2] attempted to oppose to the existence of the criminal type. If the assassin and the thief present anthropological types of such characteristic difference "how can we explain the fact, which seems quite certain, that the greater part of delinquents begin with theft and finish with murder? Must it be admitted that the thief changes his mask in becoming a murderer?" This is the result of reasoning about delinquents without knowing them by direct observation. It is not a fact that the majority of delinquents begin as thieves and finish as murderers. The famous career of crime in which Farinacio already found an argument in favor of Beatrice Cenci has not truth except in a special category of delinquents, the habitual, as I shall later explain; and even among such it is only by way of exception that the thief becomes a murderer. Criminal psychology, and I have furnished the proofs in "Omicidio," establishes the fact that thieves according to their repugnance or non-repugnance to bloodshed form two profoundly different classes. The simple thief, confidence man, or fraudulent promotor, may by habit reach the point of turbulence ("effraction") or brigandage, but it is with difficulty that he reaches the point of homicide committed solely and principally to despoil his victim. He may in certain cases commit a murder but it is to insure his impunity and he is impelled to it by the cries and the resistance of his victim. Quite the reverse, the sanguinary thief ("l'escarpe" of the French argot) is only a species of assassin and he is such by congenital tendency which in most cases is shown suddenly before adult age but which may, as a consequence of favorable exterior circumstances, never be actualized or, if at all, only much later. Thus it is not a thief who has changed his type but that he really had the homicide type before he committed the assassination. This is exactly the case when I find a convict in the prisons who shows the characteristics of the murderer and when I am told that he has been convicted of theft. The thought immediately occurs to me that this must be a quite different thief from the offensive pickpocket; and very often, if I push my inquiry, I am told that he

[1] *Dubuisson*, "Théorie de la responsibilité," A. A. C. (January, 1889), p. 37.
[2] 75. *Joly*, "Le crime" (Paris, 1888), p. 179.

has not only been convicted of theft but also for assaults, and even for murder.

§ 60. Objection that the Anthropological is a Professional.

Other objections to the anthropological criminal type have been made which bear on its signification and origin rather than on its existence. Thus Tarde, first, and others subsequently have said that the criminal type is perhaps a "professional type" of which the characteristics distinguishing the delinquent from the normal man, are due only to the kind of life and the kind of medium. And in this sense delinquents, like artists, sailors, hunters, soldiers, and lawyers, form a type by themselves.[1] Topinard in the same sense makes a further distinction. There are "mesological types" in general (mountain and malarial types), and there are "social types" produced by the impress of difference of occupations, habits, and life. All of these, however, are acquired and secondary types of "accidental collectivities," quite different from the natural types of family, race, or species; the latter are transmissable by heredity, the former are not. The collective types do not survive the generation which has seen their birth. If the conditions remain the same they are repeated but they do not perpetuate themselves.[2] Now among the characteristics which constitute the anthropological criminal type, some are acquired, like tattooing, gait, sly expression of face, language, and scars, but some are congenital, like the anomalies of the cranium, of the skeleton, of the physiognomy, the physiological anomalies.[3] One can understand how the habit of crime or a profession can impress upon the individual, even in the anatomical order, some of these acquired and truly professional marks as the consequence of the more frequent use of an organ, for instance the right arm

[1] *Tarde*, "La criminalité comparée," p. 51–53.

[2] *Topinard*, Rev. d'anthrop. (15 November, 1887), p. 661.

[3] Garofalo maintains that in the determination of the criminal type, predominance should be given to the psychic traits. I agree and I have agreed with him on this point especially when there is question of establishing to what anthropological category a particular delinquent belongs and of establishing the measures of social defense to be taken against him. But the existence of the anatomical and physiognomic type is beyond dispute and even in the practical classification of each delinquent (as Bronardel also said at the Congress of Paris, "Actes," p. 169), all of his organic, psychic, and social characteristics should concur as they concur, for example, in every medico-legal expert question with respect to the criminal insane. See *Garofalo*, report to the Congress of Criminal Anthropology of Paris, A. A. C. (May, 1889), and in the same sense see *Zuccarelli*, "L'anomalo," Nos. 5–6 (Naples, 1889), pp. 138–161.

by the sculptor, the hand in the thief, the third frontal circumvolution in a great orator (in the brain of Gambetta for example),[1] provided, of course, that there is a biological predisposition. And consequently the idea of a professional type, not however in an absolute sense, is well-founded, when there is discussion of certain delinquents by occasion, who have subsequently become habitual delinquents, for the reasons which I have given elsewhere and which I will state later. But that the kind of life, the profession, should be able to give marks foreign and even contrary to the organic and psychic activity, such as the enormous jaws and fierce expression of murderers (when it would really be to the interest of every delinquent to have a physiognomy without any significance) or the retreating forehead of thieves, is inadmissable, little as one may reflect on it. It is certain that the profession of hunter, soldier, or sailor brings about certain acquired marks in the general gait, the complexion, and in certain muscles. This has been shown by the brilliant art of Meunier for the Belgian workmen and of Orsi for the Italian peasants.[2] But in neither the hunter, the sailor, nor the miner is the twelfth vertebra lacking as Tenchini found it often lacking in criminals. The forehead does not become more or less vast nor the cranium, microcephalic or oxycephalic as the result of the profession. Further, as Garofalo has very accurately observed, when we have a delinquent who from infancy is given up to crime and not only to theft (which can be the consequence of congenital tendency or the influence of the family or surroundings) but, for instance, to atrocious murders, then in what way can the kind of life or the profession contribute in impressing upon him that criminal type of which I have given examples in the photographs of child-murderers published elsewhere?[3] Finally, Tarde himself makes certain ad-

[1] *Manouvrier*, "Cerveaux de Gambetta et de Bertillon," in the "Bulletin de la Société psycholo-physiologique de Paris" (1889), IV; *Laborde* "Leon Gambetta" (Paris, 1898).

[2] See "The Principal Works of *Méunier*," in the "Emporium" (September, 1898).

[3] As a typical example of congenital criminality, I shall reproduce from a reliable source, a case of remarkably precocious criminality, taking it from *Fallot* and *Robiolis*, A. A. C. Arch. d'antr. crim. (July, 1896). The spouses X . . . had a little girl of seven years, one of two and a half, and a boy of six months. On the 25 October, 1895, during the absence of the parents, the older girl, seeing that the younger had urinated on the floor, scolded her saying that she would tell her mother. Impelled by this threat the child (two years and a half old!) took up a long knife, a kind of butcher knife, which was on the table; and then as the sister stooped to wipe up the urine, the child approached and with all her power plunged the knife

missions which destroy all reality of a professional type, taken in a sense opposed to the anthropologico-criminal type, and after him Topinard, by denying the hereditary transmissibility of the professional marks, gives it the "coup de grâce." Tarde writes:[1] "My thought should not be misunderstood: . . . I do not limit myself to simply saying that there are muscular or indentical nervous habits born by imitation from the practice of a trade and capitalized into acquired physical traits overlying the innate traits. Further, I am persuaded that certain inborn anatomical characteristics, of an order exclusively vital and not social in their causes, are part also of the average marks peculiar to each great profession, if not to each great social class." And elsewhere he repeats: "Every great social or anti-social profession attracts those who have certain dispositions, if the careers are free; and if they are closed by castes, then there is an accumulated transmission: thus it is that nobles are born courageous, or Hebrews bankers."[2] This amounts to saying, and it is perfectly true, that a given man becomes a butcher because he has congenital characteristics which predispose him to that calling, and that another individual has predispositions to become a surgeon, or another, an artist; and the same is true of the delinquent. We do not ask anything more for the existence of the anthropological criminal type. There is, indeed, the mediocre artist who might as well have been a grocer and who in vain affects in his profession certain mannerisms like those of born-artists, but who can never borrow from them the congenital marks, for example those of a genial physiognomy. In the same way a stupid person who passes his life in study, may

into the right part of the thorax. Then she tranquilly put the knife back on the table where she had found it. The wound was eight centimeters long, penetrating almost to the ribs. If this child was not a born-delinquent, I do not know of any use in the observation of facts. The portrait of the child, published in the "Archives," shows an enormous development of the frontal sinus, with a very large head (probably hydrocephalous), very detached ears, and a savage expression of the physiognomy. "Her character," the mother said to the doctors, "is extremely violent. She is subject to frequent rages [here is the criminal impulsiveness]. She never cries. After stabbing her sister she showed no emotion and no regret. She is unusually stubborn." The physicians add: "Our observations confirm this statement by the mother. At the first glance one is struck with the grave and serious expression of this child's face. Her look is sad and serious and she frowns often, which adds to her quasi-ferocious expression." This case (and how many others there are!) has more weight in proving the existence of the criminal-born and of the criminal type than a volume of arguments. See, for instance, *Gissey*, "Un omicida dodicenne," S. P. (September, 1898).

[1] *Tarde*, "La criminalité comparée," p. 51.

[2] *Tarde*, "Criminologie," in the "Revue d'anthropologie" (September, 1888).

assume certain purely superficial characteristics of a real savant such as the scholarly stoop, near-sightedness, or pallor; but do what he will he can never have the spacious forehead, the profound eye, or the intelligent physiognomy, if he has not received these gifts from Mother Nature. Similarly, there is the delinquent who is delinquent rather through the complicity of environment than through congenital tendency and he may acquire, if he becomes an habitual delinquent, certain professional characteristics appropriate to his anti-social calling, which will constitute in him the *convict type* ("penitentiare") observed by Gautier when he spent some time in prison as the consequence of a political conviction.[1] But I repeat, this does not signify that the born-criminal, provided from birth with certain radical anatomical and physiognomic traits, is a professional type also. One cannot understand how Topinard denies the hereditary transmission of professional traits, when everybody knows families whose members from tenderest years possess a congenital professional type. Some writers, also, who have eagerly seized upon the idea of the professional type because of the ordinary prejudice which would make crime a purely and exclusively social phenomenon, have nevertheless defended the hereditary transmission of professional characteristics, against Topinard.

§ 61. Anthropological Criminal Class — a Restatement.

It is evident therefore that the reality of the anthropological criminal type which we maintain for the criminal-born is confirmed by the very ones who would wish to deny it. That a particular child-murderer should have inherited from his grandparents or his parents certain marks of the criminal type for one reason or another, together with atavic or pathological or professional anomalies, is of little importance, provided that the absolutely undeniable fact of the congenital criminal type in the anthropological sense remains, that is, a physio-psychic predisposition to such or such a form of criminality, which the conditions of the telluric and social medium can (as often happens) bring to an effective realization, but which they can also (although the case is rare) prevent from being realized. Resolving this "quaestio vexata" into its simplest terms, we contend that first of all the term should be understood to mean the individual in whom the anomalies or atavic stigmata, degenerative and pathological, are met with in

[1] *Gautier*, "Le monde des prisons," in the A. A. C. (1888), pp. 417 *et seq.*

greater number than in non-delinquent individuals of the same social classes and of the same ethnic origin. This truth, which is the fundamental discovery of criminal anthropology, is now no longer contested by any one (because it is a question of positive facts), not even by those who make theoretical objections to the idea of the criminal type. In the second place, we maintain, and this is the disputed point, that this greater number of anomalies in the criminal type (born-criminal) constitutes a real personal predisposition to crime, in like manner as the sum of certain other well-known organic stigmata give the type of the born-consumptive, that is, the individual predisposed by heredity to tuberculosis.[1] Now, some men will deny the existence of this clinical type, because a born-consumptive fortunate enough to be rich and able to live in an hygienically favorable environment reaches an advanced age without dying of tuberculosis. It is the same with the criminal type. The individual, who from birth, by hereditary transmission (as has been shown a thousand times in the alternations of alcoholism, insanity, suicide, moral eccentricity, delinquency, and sterility, in certain families tainted with degeneracy) carries in his organic and psychic constitution this junction of anomalies, is predisposed to crime. He may, if he has the good fortune to live in an exceptionally favorable medium, die without ever having violated the penal code; but he will, on the contrary, fall into natural criminality (anti-human criminality and not merely such as consists of contraventions or political heterodoxy) if the conditions of his environment make his struggles for existence difficult.[2] It is conceded that without the complicity of the medium

[1] I made this statement at the Geneva Congress, where my declarations on this matter dissipated the clouds of misunderstanding and appeared novel to those who were unwilling to recall that I had constantly reiterated them since 1880.

[2] This predisposition, or lessened physico-psychic resistance to the stimulation of the medium towards crime, is recognized even by our critics, when they are not professedly discussing the criminal type. For instance, by *Magnan*, "Actes du congrès de Paris" (Lyon, 1890), p. 58. "The infinite degrees of mental state in degenerates present the following modalities: a predominance of the intellectual faculties, defective moral condition, criminal degenerates, etc." *Buschau*, also, "Gegenwärtige Standpunkt der Kriminal anthropologie" (Cassel, 1893), admits that there exists in certain individuals "a lesser psychic resistance which may show itself by a nervous and psychic disease or precisely by crime." To the same effect is *Legrain*, "De l'alcoolisme au point de vue de la dégénération, de la morale et de la criminalité," "Actes du Congrès de Genève" (1897, p. 162). This is why Drill at the Congress of Paris (A. C. A. C. p. 162) said that the organic factor did not of itself suffice to engender delinquency without the complicity of the medium, although producing a more or less marked *predisposition* to delicts in general

the born-delinquent does not commit crime, although the slightest exterior impulsion is enough to make him yield to his physio-psychic predisposition. But in the meantime we notice that he does show the criminal type and we say that "heredity is a law

and to their varieties in particular. . . a predisposition without which the conditions of the medium would not be sufficient to determine the crime,"

Even at the Congress of Brussels, where it has been said the theory of the born-criminal was killed and buried under the blows of syllogisms, the fact is (as stated by *Van Hamel*, p. 270) that the struggle was altogether "between classical jurists and anthropologists." Houzé and Varnots, while declaring themselves adversaries of the criminal type, yet declared that "they joined without reserve in the thesis which traces the functional origin of crime to the tyranny of the organism" (Actes, Brussels, 1893, p. 122) and formulated the first conclusion of their report, thus: "The anatomical type designated by Lombroso as belonging to the born-criminal is a composite hybrid product, uniting characteristics drawn from different sources. (Eh! What difference does that make?) It is therefore a real (?) type. *Even admitting that the type exists, it becomes real only in the minority of delinquents* (but this is precisely because the criminal-born are in the minority in the number of delinquents). It must therefore be rejected" (p. 126). And on the contrary I say that it must be maintained for the simple reason that it exists and is met with.

Liszt himself, who has made some reputation in Germany by drawing on the theories of the positive school with eclectic dilutions a few years ago and without then indicating their source, finally notes that social circumstances determine the movement of criminality "by their influence on the ascendants of the delinquent and at the same time on his innate personality" (A. C. A. C., Brussels, 1893, p. 92).

Better still: Tarde, the great master of argument against the criminal type, since he says there are no "clean-cut and indisputable anatomical characteristics appropriate to disclose the criminal" (does he pretend that the criminal type in order to exist should have two noses and four eyes?) admits that "we are not on that account prevented from affirming the existence of organic and physiological predispositions to crime," "Actes du Congr. de Paris (Lyon, 1893), p. 199. And the same Tarde, when he is not bestride the enchanted broom of abstract syllogisms, and when he holds to the description of realities which he has seen as a criminal judge ("juge d'instruction"), speaks of an assassin whom he unmasked in these terms: "Among these workmen I saw a young and vigorous fellow *with the physiognomy of a hyena and a sinister and hard look.*" "Études de psychologie sociale" (Paris, 1898), p. 229.

This is what may be called an unconscious revelation of the criminal type by a man who in words is one of the rudest of adversaries, and naturally if he were asked to admit it he would at once build up syllogisms for the construction of a gratuitous denial. This is what he did in the session of 18 Nov. 1896, of the Société des prisons at Paris. The report of Motel on the Congress of Geneva was under discussion. The advocate Martin, in support of our theories, related a visit he made to the House of Correction at Douaires and the fact observed by the director "that the physiognomy of a great number of these delinquents remained *repulsive* in spite of all the efforts made for their improvement." Tarde said: "As M. the advocate Martin has remarked, there is a bestial type: the forehead is retreating, the jaw is often heavy. But (and here is the reasoning of a prejudiced man) if you take the most guilty among these juveniles, those who have committed the most serious crimes, you will find that they do not always present the most serious

which manifests itself by a tendency."[1] Further, even among domestic animals, there are, as Corre remarks, real born-delinquents, well-known to all trainers, that is, individuals that are refractory to all discipline, "individuals that are unconquerable, sly, insubordinate."[2] Similarly, in insanity, there is the physio-psychic type of the "hereditary insane," *i. e.*, the man predisposed to insanity. And yet, as Maudsley[3] has said, many persons with the taint of hereditary insanity, never become violent and live a sufficiently regular life, if fortunately they meet with exceptionally favorable circumstances and conditions. Although in insanity social causes also have great importance, yet no one any longer denies (and this was not the fact in the beginning of modern psychiatry) the hereditary predisposition to insanity and the "insane temperament." If one comprehends the criminal type thus, as the Italian school has always so comprehended it, of what importance are syllogistic objections, except as indices of veiled spiritualism hostile to the admission of this proof of the dependance of the physical on the moral, or as ill-founded preoccupations of metaphysical socialism which shrinks from the affirmation that crime is inevitable and fatal, whatever changes may be brought about in the social medium? It is therefore understood that when we speak of the criminal type and of the born-criminal, we mean the affirmation of a physio-psychic predisposition to crime, which in certain individuals may not end in criminal acts (as the predisposition to insanity may not end in madness), if restrained by favorable circumstances of the medium, but which, when these circumstances are unfavorable, is none the less the sole positive explanation of the anti-human and anti-social activity of the delinquent.

§ 62. Heredity and Environment.

One can also understand that we assert the "fatal inevitability of crime" and that we also recognize, even in our first edition (1881), in our theory on the prevention of criminality ("sostitutivi

anomalies." ("Revue penitentiare" [1896], pp. 1248 and 1252.) Tarde made that statement without adducing any proofs, because he has never made a methodical study even of a hundred delinquents, and because he is only a cabinet critic, while we not only assert the contrary but we prove it by anthropological researches in prisons, insane asylums, and elsewhere.

[1] *Pierret*, "Les grandes lignes de l'hérédité psychopathique," R. S. (22 May, 1897).

[2] *Corre*, "Les criminels," p. 372.

[3] *Maudsley*, "Responsibility in Mental Disease," last chapter.

penali"), that by changing the environment, influence can be exerted (within the limits of individual existence) on the great mass of delinquents by occasion and habitual criminals, and in the course of a few generations, thanks to heredity, on the class of the born-criminal and the born-insane.[1] Observation, therefore, does not permit us to suppose, like Manouvrier, "that the same individual may act in a thousand different ways according to the influences to which he is subject, without on that account undergoing any physiological or anatomical variation," so that "education, medium, social circumstances may turn a quite honestly constituted man into a rascal"; although "man is born a criminal just as a dog is born a swimmer, he is always very capable of committing a crime." [2] This is not true, for an individual who has not the predisposition to crime may in extremely unfavorable circumstances develop more or less violent insanity, or even commit suicide, but he never becomes a "rascal." One does not become insane at will nor does one become criminal at will. Such, therefore, is the last conclusion on the undeniable criminal type. While in the born-criminal the origin is almost exclusively biological; in occasional delinquents who have become habitual criminals, the origin is largely social. Yet even in the latter, as I shall say at the proper time, biological influence is not wholly excluded. Occasional delinquents, even in similar environment, do not all become habitual delinquents, because there are some among them who are endowed with a greater biological power of resistance to external crime-breeding conditions. This amounts to saying that not only among delinquents but also among the professional or psychological groups, there exists in certain cases a bio-social type in which congenital or acquired characteristics predomi-

[1] *Ottolenghi*, in tabulating the differences of sensibility according to the social condition, "Archive de Biologie (1895, XIX, 101), found that in the lower classes of society there is a minority of individuals with superior sensibility and that in the higher classes there are individuals of inferior sensibility (exactly as there are virtuous types among the unfortunate, and criminal types among the rich, in spite of the medium). Hence, "the scientific certainty of these minorities gives a less fatalistic significance to the problem of anthropological inequalities, since civilization does not tend to determine inequalities." When the social medium better assures the development of every human personality this select minority among the unfortunate who are now atrophied by poverty, will become more and more numerous; while even in the higher classes a less feverish (decreasing the pursuit of wealth). and a less parasitical existence will reduce the frequency of involutive degeneracy.

[2] *Manouvrier*, in the A. C. P. (Lyons, 1895), pp. 19, 155; "La genèse normal du crime" (September, 1893), p. 144.

nate, depending on whether the individual is more or less prepared by his physio-psychic constitution for a given profession or whether he has been destined for it rather by family and social reasons. But there further exists, also, a purely biological or anthropological type of delinquent, precisely in the cases where the criminal tendencies are congenital and are shown from the earliest years, together with radical anatomical, physiognomic, and even psychic characteristics (impulsiveness, moral insensibility, extraordinary improvidence) which can not be explained as solely produced in the individual by habits of life or by social conditions.

§ 63. Criminal Etiology.

Such is the conception of the criminal temperament, which I disclosed elsewhere,[1] indicating the means of establishing a criminal etiology. This will be the practical crowning of this scientific work which in a few years has so brilliantly expanded on its double base of criminal anthropology and criminal sociology and which, after garnering such a quantity of analytical data that it is at times encumbered by it, must henceforward use these data and their partial investigations for a bio-sociological synthesis: and this will be the theory of the difficult but fruitful art of social therapeutics.[2]

§ 64. Hypotheses as to Nature and Origin of Crime.

Aside from the negative opinion of classical criminal science, according to which crime has no specifically biological nor social character, being only the fiat of the individual free will, criminal anthropologists have given many explanations and hypotheses on the nature and origin of delinquency. They can not be disregarded, although these hypotheses seem to me often hasty and premature and although they add nothing of merit in scientific knowledge or practical applicability to this positive determination of the organic and psychic characteristics in criminals, which is

[1] *Ferri*, S. P. (August, 1896).

[2] As indications for this synthesis, see the monographs of *Rossi* and *Ottolenghi* on two groups each of a hundred criminals (Turin, 1898); *Del Greco*, "Il temperamento epilettico," in the "Manicomio" (1893); *Hamon*, "La psychologie de l'anarchiste socialiste" (Paris, 1895); *MacDonald*, "The Criminal-type"; and with less definiteness, *Del Greco*, "Temperamento e carattere nelle indagini psichiatriche e di anthropologia criminale," in the "Manicomio" (1898), p. 161, and "Sulla psicologia della individualità," in the "Atti di Società Romana d'anthropologia" (1898), fasc. 3.

really the most important and most fruitful endeavor of criminal anthropology. Let us begin by studying in the most positive and exact way the different classes of delinquents. We shall then force ourselves to explain their origin and nature, — a synthetic research which should always be preceded by a persistent analysis as complete as possible. In this we shall place ourselves primarily at the view-point of criminal sociology, for while an ultimate explanation of the nature of delinquency may have interest, up to a certain point in the technical order of research in criminal anthropology, yet it has no immediate and necessary relation to criminal sociology.[1]

The things that are important for the sociological criminalist to know in order to draw his juridical and social inductions, are the factors of criminality which are susceptible of positive observation in the biological, as well as in the physical and social order. It is really from the more or less abnormal tendencies and dispositions, hence more or less corrigible, in the different categories of delinquents, that he draws his conclusions as to the proper treatment to be applied to them, to maintain an equilibrium between the necessities of social defense in the offended and the rights of human personality in the offender. Whatever may be the origin and biological nature of delinquency, the sociological conclusions will not be influenced thereby, since the degree of abnormality and of corrigibility in each category of delinquents can be completely determined by other elements, outside of the general hypotheses. This will become evident in the course of this work. If, however, it be desired to give some critical notice to these hypotheses, they can be reduced to the following:

The comparative examination of these different hypotheses is very suggestive, and very useful in judging the scope and value of each of them and in reaching that synthetic conclusion which, to my mind, is the expression of the positive truth.

[1] This is also the opinion of *Gambini*, "Sulla genesi della delinquenza," S. P. (March, 1899).

Crime is a phenomenon of:

- *Normality*
  - biological (Albrecht).
  - social (Durkheim).
- *Biological Abnormality by . . .*
  - *atavism*
    - organic and psychic (Lombroso, Kurella).
    - psychic (Colajanni).
  - *pathology of*
    - neurosis (Dally, Minzloff, Maudsley, Virgilio, Jelgersma, Bleuler).
    - neurasthenia (Benedikt, Liszt, Vargha).
    - epilepsy (Lombroso, Lewis, Roncoroni).
  - *degeneracy* (Morel, Sergi, Féré, Zuccarelli, Magnan, Corre, Laurent).
  - *defect of nutrition* of the central nervous system (Marro).
  - *defect of development of the inhibitive centers* (Bonfigli).
  - *moral anomaly* (Despine, Garofalo).
- *Social . . . Abnormality by . . .*
  - *economic influences* (Turati, Battaglia, Loria).
  - *juridical inadaptation* (Vaccaro).
  - *complex social influences* (Lacassagne, Colajanni, Prins, Tarde, Topinard, Manouvrier, Raux, Baer, Kin, Gumplovicz).

Biologico-social Abnormality (Ferri).

§ 65. Biological Norm or Basis of Origin and Nature of Delinquency.

According to the conclusion supported by Albrecht at the First International Anthropological Congress (Rome, 1886), delinquents, in reproducing the tendencies, habits, and often the organic characteristics of the animal world, would represent the normal life of nature which is everywhere murder and robbery, while the conduct of an honest man would be the exception and hence the anomaly in the natural order. I had no difficulty in replying to the illustrious anatomist with the unanimous assent of the members present, that his paradoxical conception might still be admitted in the sphere of comparative anatomy and of universal life but that it had no foundation in human life, which alone concerned the criminal anthropologist and sociologist. And further, since it is evident that delinquents, under whatever form they are met with in present humanity, are in the minority in comparison with the

total of honest folk, they really represent an exception in the human world, and hence constitute a biological as well as social abnormality.[1] I further said that, even from the point of view of comparative anatomy, it is inaccurate to assert that murder and robbery are the normal conduct of animals,[2] since the animal acts which correspond to murder among men are not the murder of an animal by any other animal whatsoever but only when the slayer and the slain belong to the same species. Hence, as there is no crime when a man kills a mammal for food, it cannot be said that a carnivorous animal commits an anti-natural act when it kills an herbivorous animal. In this more exact sense, one cannot assert that universal life consists as a general rule, that is, normally, in murder, ravages, and thefts, understood in the anti-natural sense, in the same way that we understand crime in humanity in an anti-social sense. This consideration also destroys the similar assertion of Bonfigli,[3] to the effect that crime only exists because of and in the measure of the prohibition of the law and that consequently "there are no acts criminal in themselves, *i. e.*, naturally such, since they must be considered as acts *destined to satisfy physical needs*, — rape, for instance, responding to the need of reproduction; theft, to the necessity of nourishment; murder, to the elimination of competitors." The procuring of nourishment, reproduction, and the destruction of a competitor are so many natural acts when they do not offend the individuals of the same species, with the same physiological needs and the same conditions of existence; but they become anti-natural (criminal) in man when in the satisfaction of our own physiological needs, we obstruct and destroy for our fellow-men, the conditions which are also indispensable for them in the satisfaction of their needs.

§ 66. Sociological Norm as Basis of Origin and Nature of Delinquency.

The idea that commission of crime is a normal act has been recently maintained from a purely sociological standpoint, by Durkheim,[4] who distinguishes normal from abnormal by the

[1] See "Actes du premier congrès international de l'anthropologie criminelle (Rome, 1886), pp. 110 *et seq.*

[2] See *Ferri*, "L'Omicidio," Introd.

[3] *Bonfigli*, "La storia naturale del delitto" (Milan, 1893), pp. 18, 19.

[4] *Durkheim*, " Division du travail social," pp. 33, *et seq.*; "Les règles de la methode sociologique," pp. 81 *et seq.*; R. P. (June, 1894); "Le suicide" (Paris, 1898), p. 413.

same mistaken criteria that I pointed out in my reply to Albrecht, when I called that social fact normal which occurs most often in time and space. Now, since crime shows itself in every human society, Durkheim concludes that crime is a phenomenon of normal sociology; or rather that it is a "factor of the public health, an integral part of every healthy society." In the first place, as Gualterotti [1] had already remarked, Durkheim falls into a contradiction when he admits that crime being a phenomenon of normal sociology the delinquent may be an abnormal individual, as if the specific product of an abnormal personality could be normal. It is obvious, moreover, that in pronouncing the criminal phenomenon normal, Durkheim has gone astray on the normality and constancy of a social fact, for a social, or even a biological, fact may be constant and yet abnormal if it occurs in the lesser number of cases. Otherwise one should also say that disease is a phenomenon of normal biology, because in all times, in all places, in all organisms, disease is observed. The positive criterion is on the contrary, as I told Albrecht, found in the majority or minority of the cases which show one phenomenon or another for each social group. That is why parricide, a horrible crime in Europe and America, is a permissible act and even a duty among the Battas of Sumatra. As to Durkheim's second assertion, namely that crime is a factor of the public health (although Tarde,[2] forgetting the distinction between a normal and a constant fact which we have just given, was very much scandalized by this heresy), we believe that it is partly true to say, as does Lombroso, that crime may have some useful effect in society, as pain and even disease may have in the organism of the individual.[3] Genius itself is a degenerescent abnormality;[4] but it is almost always useful to society, because it is a higher form of degeneracy (evolutive); whereas crime and insanity, which are a lower form of degeneracy

[1] *Gualterotti*, "Patologia e delitto" S. P. (1894), p. 833.

[2] *Tarde*, "Criminalité et santé sociale," R. P. (February, 1895), and in "Études de psychologie sociale" (Paris, 1898), p. 136. Durkheim replied (R. P., May, 1895), to his sentimental and unscientific tirades, that the proofs of science must be accepted, no matter what are the impressions of sentiment. Otherwise we are not men of science, "but more or less consistent mystics; and mysticism is the reign of the imagination in the intellectual domain."

[3] *Lombroso*, "Les bienfaits du crime," in the "Nouvelle Revue" (July, 1895), and Riv. di sociologia (November, 1895). He has added the idea of the Symbiosis, *i.e.*, utilization of crime by society, as the final conclusion of the third volume of "l'Uomo delinquente."

[4] See *Lombroso*, "L'Uomo di genio," 6th ed. (Turin, 1894); "Genie e degenerazione" (Palermo, 1898).

(involutive), are almost always harmful and only useful by way of exception.[1] Yet neither in Durkheim's observations — which Sorel calls courageous [2] and to which Tarde could oppose only commonplace artifices of syllogistic controversy — nor in the observations of Lombroso, is the truth complete, because they did not make the distinction (that I have recently made) between atavic or anti-human criminality and evolutive or politico-social criminality.[3] It is quite certain that all the social damages imputed to crime by common sense and by Tarde in his controversy with Durkheim are very real if one speaks of atavic criminality, while they are less real if one speaks of evolutive criminality, which may even contribute by reaction to social progress because, as Durkheim says, "Sometimes the criminal (I add evolutive) has been the forerunner of future morality."[4] Thus, for example, the whole history of the labor movement in England since 1800 shows how the popular agitations which lasted until about 1870, contributed to bring about the present political liberties and mutual respect in the economic struggle between capitalists and workmen; and yet these agitations almost always took the forms of criminality (evolutive) in strikes accompanied by violence, riots, and outrages.[5] In any event, whatever may be the result of the social counter-effects, crime is always a form of abnormal activity and hence we cannot admit with Durkheim that crime belongs to normal sociology and not to social pathology.

§ 67. Biological Abnormality as Organic or Psychic Atavism as Basis of Origin and Nature of Delinquency.

Among the biological explanations of criminality of which we are now going to speak, the most characteristic, and hence the most actively combated, is that of organic and psychic atavism given by Lombroso in his first two editions. This character of atavism is absolutely undeniable in many anomalies of criminals: but the explanation by atavism (indeed like all those which are

[1] *Ferri*, "La réhabilitation des anormaux," in "Revue des Revues" (15 February, 1899).

[2] *Sorel*, "Théories pénales de Durkheim et de Tarde" (15 February, 1899).

[3] *Ferri*, "Delinquenti e onesti," S. P. (June, 1896); *Sighele*, "Mondo criminale italiano" (Milan, 1895), had, however, distinguished atavic crime from evolutive but from the morphological point of view, by the substitution of fraud for violence rather than by its content and its determinant motives.

[4] *Durkheim*, R. P. (May, 1895), p. 521.

[5] *Sydney and Beatrice Webb*, "History of Trade Unionism," Cap. II, III.

purely biological or purely social), although it has been taken up and maintained by Kurella,[1] and although it is in relation to the born-criminal the fundamental explanation, has the defect of not embracing all of the anthropological categories of delinquents, nor even all the habitual cases in the same category. It must be obvious to one who has studied delinquents, that those who are only delinquents occasionally show much fewer anomalies in general and fewer atavic anomalies in particular; and that even among born-criminals there are some whose type is clearly atavic and others whose type more nearly borders on pathology or organic and psychic degeneracy. For this reason, Lombroso himself, as early as the third edition of his "Uomo delinquente," said: "Arrested development thus shows us disease concurrent with that atavism to which we have acknowledged such predominance. Atavism remains in spite of disease or, more accurately, together with disease, one of the most constant characteristics of the criminal-born":[2] a fact which, parenthetically, has not prevented many critics from repeating to satiety, that Lombroso thinks atavism the sole explanation of congenital criminality, in the same way as they have continued to repeat that he studied only the cranium of criminals.

§ 68. Biological Abnormality of Epilepsy as Basis of Origin and Nature of Delinquency.

Thus, Lombroso, modifying the synthesis in the measure that he diversified and completed the analysis of facts, has, in his last edition, more closely associated atavism and pathology in the explanation of criminality basing the latter on epilepsy and moral insanity. After declaring for the almost exclusive predominance of atavism he later coupled moral insanity with congenital criminality. And this conception is now accepted by the greater number of Italian alienists as shown in Tamburini's report of the phreniatric Congress of Sienna (1886). And lately Lombroso has added that at the bottom of moral insanity and delinquency is epilepsy or the epileptoid nature of the various criminals; and that in many cases arrested development and degeneracy are also present. Naturally this explanation has been met with a horde of objections and of these the following are the two principal ones:

[1] *Kurella*, "Naturgeschichte des Verbrechers," p. 255. See also *Sorel*, "La position du problème de M. Lombroso," R. S. (18 February, 1893), p. 207.

[2] (1884), p. 589.

I. Not all delinquents are epileptics (and Lombroso never said they were); nor have all of them the epileptoid nature.

II. Epilepsy or general pathology excludes atavism, because "it can not be said that epilepsy is a form of return to our savage or prehistoric ancestors."

In my opinion these objections lack solidity, because, following such a conception, delinquency would not be (except in the cases where criminals were also epileptics) a form, but rather a transformation of the epileptic or epileptoid condition, and again; because atavic and animal traits and habits are observed in epileptics who are not delinquents. There is no real conflict between atavism and pathology as is shown by many forms of insanity and idiocy. As far as one can judge, the explanation of delinquency by epilepsy, to which Lombroso has given a rich series of symptomatic proofs, is fundamentally true, as is confirmed by the researches of Tonnini, Ottolenghi, Roncoroni, and De Arcangelis.[1] I have found that it is almost always the sole positive explanation in all of the strange, unforeseen, and motiveless crimes against the person, against decency, or even against property. In spite of this, the explanation by epilepsy appears incomplete when one reflects that there are many simple epileptics who do not commit crime although subject to social and physical conditions in which the evil plant of crime thrives vigorously.

§ 69. Biological Abnormality of Organic or Psychic Atavism as Basis of Origin and Nature of Delinquency.

I have already said that Colajanni's conclusion on crime, which he considers "as a phenomenon of psychic atavism," is in flagrant contradiction with the rest of his book, wherein he criticises as erroneous and valueless (without accepting a single one) all of the partial conclusions of criminal anthropology, whether in the organic or in the psychological field, only to accept in the end this hypothesis of atavism which is the oldest and most contested synthesis of these partial conclusions of fact. But even aside from this, a purely psychic atavism is inconceivable unless one also admits the organic atavism which Colajanni wishes absolutely to exclude,

[1] *Tonnini*, "Le epilessie rapporto alla delinquenza" (Turin, 1891); *Ottolenghi*, "Il campo visivo negli epilettici e delinquenti" (Turin, 1891); "Epilessie traumatiche," in "Grionale di Accademia medicale" (Turin, 1890-91); "Le epilessie psichiche," in "Revista sperimentale frentricia," 1893; *G. Roncoroni*, "Trattato clinico de l' epilessia" (Milan, 1893); *De Arcangelis*, "Le stimmate epilettoidi nei criminali alienati," R. S. F. (1897), pp. 324 and 567.

or which without any scientific reason he would limit exclusively to the central nerve cells, as if these latter lived and were transmitted by heredity in space and not indissolubly bound to all the other organic elements of life.[1]

§ 70. Biological Abnormality of Neurosis or Neurasthenia as Basis of Origin and Nature of Delinquency.

In opposition to the explanation by atavism, we have the explanation of delinquency as a phenomenon of pathology, which has been developed in different ways by different authors. While Lombroso (and with him Bevan Lewis,[2] besides several Italian criminal anthropologists) traces the pathological condition of the delinquent to an epileptoid origin, the English psychopathists (Thomson, Maudsley) and Virgilio in Italy consider crime as only a branch of the trunk to which insanity also belongs. According to Maudsley there is an intermediate zone between the branch of crime and that of insanity. Benedikt, on his part (followed by the jurists Liszt and Vargha),[3] conceives the pathological condition, in which crime originates, as a physical, moral, and esthetic neurasthenia, either congenital or acquired, that produces the professional criminal: then the delinquent by disease or intoxication and the degenerate criminal are added. Of these last hypotheses, that of Benedikt seems very vague since by the term "neurasthenia" we neither add to nor particularize our clinical or biological knowledge of the nature of delinquency; not to mention that the symptoms given by Béart for neurasthenia or nervosism (which to the American neurologist have very little difference although Colajanni thinks the contrary) do not alto-

[1] I believe, however, that Colajanni only raised the hypothesis of psychic atavism because it had been mentioned, shortly before the publication of his work (1889) by *Jauvelle* on Atavism psychic, B. S. A. (Paris, 1887), and by *Mantegazza* ("Gli atavismi psichici"), in the A. P. A., 1888. As *Groppali* brought to my attention at the Second International Congress of Sociology, in the "Pensiero italiana" (December, 1896, p. 417), "the central and inspiring idea of Colajanni's work is the predominance of the social factors in crime" which he has borrowed from the little work of *Turati*, "delitto e questione sociale" (Milan, 1883), and with which I shall deal presently.

[2] *Bevan Lewis*, "The Genesis of Crime," in the "Fortnightly Review" (September, 1893); also *Cabadé*, "De la responsibilité criminelle" (Paris, 1893), p. 298, admits "a very great analogy" between crime and epilepsy. See also *Peixoto*, "Epilepsia e crime" (Bahia, 1887).

[3] *Liszt*, "Aperçu des applications d'anthropologie criminelle," in the "Actes du congrès de Bruxelles" (1883), p. 95; *Vargha*, "Die Abschaffung der Strafrechtschaft" (Gratz, 1896), I, Cap. I.

gether agree with the symptoms of born-criminals (the professionals of Benedikt), among whom something quite different from nervous exhaustion is observed. Benedikt's hypothesis is wholly applicable only to the single category of physical neurasthenic vagabonds among whom there has long been observed an organic debility that unfits them for all regular and prolonged work. As to the common origin of crime and insanity, that is in many cases more true. There are, however, many delinquents by occasion whom it does not explain; and it does not tell us why there are a multitude of insane who are not at all delinquent. There is certainly a frequent and strong analogy between crime and insanity, just as there is between all of the more serious forms of human degeneracy; but this analogy falls short of a complete explanation. Furthermore, there is really a profound difference, both of anthropological type and psychic characteristics, between ordinary madmen and the criminal insane.[1]

§ 71. Biological Abnormality or Degeneracy as Basis of Origin and Nature of Delinquency.

In the last few years there has been a great revival in biological and psychological circles of the conception of degeneracy, which after its promulgation by Morel in 1857 was long quite neglected. While there is some truth in this explanation of the origin of crime there is also much that is vague. No precise and positive biological idea of degeneracy is given and it is considered, in harmony with Morel's theory, as "a deviation of the primitive or normal type," which goes on by transformation and aggravation in successive generations until it is extinguished by sterility or suicide.[2] This idea of degeneracy has now become so broad that "it comprehends everything that is referred to it" and by explaining too much ends in explaining too little. It is, as Sorel observes, "a vague and convenient formula which permits of agreement provided one is not specific on anything."[3]

[1] I have often observed this difference and analogy in comparing the inmates of asylums for the insane and those for the criminal insane, such as that at Montelupo in Tuscany.

[2] "Dégénérescence," in the "Dictionaire encyclopédique des sciences medicales" by *Dechambre*, and in the "Dictionaire des sciences anthropologiques." See also *Dallemagne*, "Dégénérés et déséquilibrés (Brussels, 1894); *Giuffrida Ruggieri*, "Sulla dignità morfologica dei segni detti degenerativi" (Rome, 1897); A. S. R. A., fasc. 2–3; *Lombroso*, "Caratteri speciale dei degenerescenci," in the A. P. (1898), XIX, 255, where he distinguishes three great species of degeneracy — cretinous, epileptic, and paranoic.

[3] *Sorel*, R. S. (1893), I, 208.

§ 72. Biological Abnormality of Defective Nutrition as Basis of Origin and Nature of Delinquency.

The same must be said of Marro's hypothesis of "defective nutrition of the central nervous system": while it presents a partial truth which explains the irritable weakness and impulsiveness of delinquents, yet it remains indeterminate, since this defect of nutrition may give rise not only to crime but to every other form of biological inferiority, from simple organic and physical debility without any other results, to suicide and insanity.

§ 73. Biological Abnormality of Defective Development of Inhibitive Centers as Basis of Origin and Nature of Delinquency.

Less indeterminate is the idea of Bonfigli who discovers the origin of crime, not in the natural sense of the word but in the sense of action contrary to the laws in force, in the nervous system "where the forces of the inhibitive centers are not well-proportioned to the functional activity of the other parts of the same system." Aside from the question whether there are really and strictly speaking, centers of cerebral inhibition,[1] it is a fact, as I have shown in "L'Omicidio"[2] that impulsiveness due to defect of cerebral inhibition is the fundamental psychic characteristic of the criminal. But it is also true that this purely descriptive explanation does not help us very far along the road to the genetic explanation of criminality.

§ 74. Biological Abnormality of Moral Anomaly as Basis of Origin and Nature of Delinquency.

Finally, Despine's idea, taken up by Garofalo, to the effect that congenital criminality is not within the real field of pathology properly so called, but is limited to an anomaly of moral sense, does not seem to me to correspond to fact; because, even in the single category of born-criminals (always disregarding criminals who are evidently insane), it is impossible to exclude the more or less striking presence of pathological characteristics. It is also impossible to forget hereditary transmission which is always verified in criminality, insanity, suicide, and moral anomalies, a fact which demonstrates their common nature. The clean-cut sepa-

[1] *Oddi*, "L'inibizione dal punto di vista fisio-patologico, psicologico e sociale" (Turin, 1898).

[2] V. P. II, Cap. X.

ration that Garofalo attempts to make of congenital criminality and insanity is not scientifically exact, — for instance, when he reiterates, with Esquirol and others, that in the madman crime is an object in itself, while in the criminal it is the means of obtaining some selfish end.[1] On the contrary, there are insane persons who commit crime either to attain a legitimate though imaginary object, for example self-defense under the delusion of persecution, or from anti-social motives of revenge, lust, or other motives just like ordinary criminals. The insane to whom crime is its own object are but a slight minority, for example, the homicidal maniac and kleptomaniac. Nor would it be enough, in abandoning this criterion (as Garofalo did) [2] to hold as he does to the other proposition, namely, that the psychic process which determines crime in the madman "is not in agreement with the external cause," whereas in the born-criminal, "it is in agreement with the impressions of the exterior world." There are, indeed, madmen who act as I have already said, through vengeance, lust, or cupidity, adapting the means accurately to the end and taking account of offenses received and exterior temptations, or, vice versa, there are sane criminals whose acts are not in agreement with impressions from the exterior world, such as the assassin-thief who first kills and then despoils his victim without any consideration of personal defense or of impunity and through purely instinctive ferocity. There is, again, the criminal who kills the "first passer-by" to win the respect of his companions; and the criminal who engrafting an altruistic sentiment on an atrophied moral sense, despoils or kills an innocent victim, in aid of a third person, and so on.[3]

§ 75. Biological Abnormalities as Basis of Origin and Nature of Delinquency, — Summary.

To summarize: Each of these biological explanations of criminality is true in part. I say in part because each of them is verified more or less completely by facts, in such or such a variety of each category. But none of these hypotheses is sufficient nor complete; first, because they are not sufficient to explain the natural genesis of crime in all the categories of delinquents; in the second place, even when they agree with the characteristics

[1] *Garofalo*, "Criminalogia," 1st ed., p. 99.
[2] *Garofalo*, "Criminalogia," 2d ed. p. 106.
[3] *Ferri*, "L'omicidio," pp. 589 *et seq.*

of a given criminal type, they still fall short of giving the precise and fundamental reason why in some individuals a given condition of biological abnormality presages crime while in others only insanity, suicide, or simply an organic and psychic inferiority. Why is it, that of a hundred insane subjects, either neuropathic, neurasthenic, epileptic, degenerate, defective in the nutrition of the nervous system or of the inhibital centers, or who show general anomalies, there are only twenty, thirty, or fifty who commit crimes while the others do not? In some of the cases a satisfactory reply may be given that the others may be influenced by a favorable physical and social environment, which instead of turning the balance to the side of their biological anomaly, restricts it and prevents them from passing to excesses rising to the grade of crime. Even this does not fully explain; for there are degenerates and madmen, living in about the same family and social environment, some of whom become delinquents while others do not, and some become sanguinary and violent, while others, with an organic repugnance to homicide, commit thefts or frauds, and vice versa. The varying differences of exterior circumstances, which are inevitable for each moment of life and for each individual, do not explain this enormous difference in the final result. Of two idiots similarly treated in their family and subject to the same influences, one responds to pleasantries by murder and the other not. Of two degenerates or two insane persons who are refused in marriage, one kills the young woman and the other kills himself at her feet. Of two or more degenerates or neurasthenics, as the result of poverty, one becomes merely an inoffensive vagabond who does nothing worse than beg, while another devotes himself to theft and even to violent robbery accompanied by murder. There is no explanation for the differences, and a thousand other illustrations could be cited. It is useless to say, as does Manouvrier,[1] that two individuals, even living in the same family, never find themselves in exactly identical conditions of environment, because, although true in an abstract and metaphysical way, yet in reality the little differences of circumstances and environment, as between brothers living in the same family, are not a cause proportionate to the enormous difference of results, where one, for instance, remains honest and the other becomes a murderer, or where one of them to escape poverty prefers suicide to murder. The fact is that the biological factor of criminality,

[1] *Manouvrier*, "Les aptitudes et les actes" (October, 1893), p. 327.

the criminal temperament, consists in something specific that has not yet been determined, but without which there is no explanation of such diverse results, out of all proportion to the exterior circumstances in which are often found individuals of every social class tainted with some stigmata of organic or physical anomaly. I become more fixed in this conclusion when I think of the criminal type which serves to distinguish delinquents not only from normal individuals but also from the insane, the degenerates, epileptics, and non-delinquent neurasthenics.

A study of the inmates of an ordinary insane asylum, such as I made at Pesaro and at Bologna, is enough to at once establish this fact. A great majority of these unfortunates do not show the criminal type (especially in the physiognomy), while on the contrary, in a small number of insane who have committed crime, the criminal type is frequent. The well-defined type of the murderer, such as I distinguished it in one young soldier out of seven hundred, I have met with in only three or four insane persons in the asylum of Pesaro; and in the same way that the soldier told me he had been convicted of homicide in his infancy, these insane persons proved to have been tried for murder. I can distinguish the homicide type among a hundred persons affected with general degeneracy or epilepsy or neurasthenia. And inversely, in the asylum for the criminal insane at Montelupo, I found a great number of criminal types always cleanly divisible into murderers and non-violent thieves, for the simple reason that there are there confined, not ordinary insane and degenerates, but delinquent madmen and degenerates. This does not contradict the fact that there are on the other hand some delinquent degenerates who do not show the criminal type and who have observable symptoms of only serious degeneracy. This is because a very serious degeneracy may efface the specific marks of criminality in its external manifestations.

This amounts to saying that criminality, especially when congenital (but in part when occasional), is a really specific form of biological anomaly, which in the field of race and temperament, is distinguishable from every other form of anomaly, pathology, or degeneracy, and leads precisely to active crime, when favored by given physical and social conditions that offer to the predisposition of the individual the occasion and the means.[1] Hence, not as explaining

[1] In agreement with these ideas which he develops, see *Del Greco*, "Malattia e teoric biologiche della genesi del delitto," in the "Manicomio" (1896), Nos. 2 and 3, and "Temperamenti e carattere nella psichologia antropologia criminali" (1898), p. 42.

the essence or nature of criminality but simply because it is necessary to give expression to my thought, I believe that the most accurate and most positive conception from the biological standpoint, is that of a "criminal neurosis," distinct in itself from any pathological, atavic, degenerative, or other form whatsoever: a criminal neurosis that one might again term, with Virgilio, a form of "psychic teratology," with which are certainly associated in a given delinquent in a more or less predominant way, some characteristics of atavism, retarded development, neurasthenia, or degeneracy, but which of itself constitutes the specific factor whereby a particular individual, with certain biological characteristics and exposed to certain influences of physical and social environment commits a given crime. If I wished to attempt one further step in advance I might repeat what I have said elsewhere; namely, that the condition of physio-psychic anomaly (through atavism, pathology, and degeneracy), while affecting the whole nervous system and organism of the individual, may preferentially attack the intelligence, the affections, or the will, and that in the first case we would have insanity, in the second, crime, and in the third, suicide, it being conceded that insanity is the shipwreck of the intelligence, that crime is the lack or loss of the moral or social sense, and that suicide is the bankruptcy of the will in the struggle for existence.[1] Be that as it may, the substance of my thought returns to the point where it attributes to criminality of whatever form and category, a complex origin and nature, both biological (in the specific sense indicated above), as well as physical and social. As for the biological factor considered separately, crime is explicable only by the special and characteristic condition, called for want of a more exact term "criminal neurosis," so also no crime, no matter how insignificant, can be positively explained, unless it be considered as the resultant not only of the biological factor but also of the physical and social factors. Certainly the predominance of a given order of factors determines the distinctions in the mass of delinquents, in accordance with a classification which we shall see later. But it is also certain that every delinquent and every crime of any category, is the simultaneous product of the concurrence of these three natural orders.[2] This synthetic

[1] See also *Angiolella*, "Manuale di anthropologia criminale" (Milan, 1898), p. 309.

[2] It is because the genesis of delinquency is biologico-physico-social that it is called in my theory, when considered as an anomaly, a biologico-social anomaly, since it could not be called an anomaly of the physical (telluric) medium, although that necessarily concurs in its determination.

explanation of the origin and nature of crime has never been directly attacked either by the metaphysical critics or by the positivists of the new school. They thus implicitly admit that it is true and complete: after some criticism of detail on particular points of the natural genesis of crime, they even gave the impression that they were entitled to the credit for this proposition of the concurrence of the different criminal factors which we have asserted from the beginning.[1]

§ 76. Basis of Origin and Nature of Crime Complex.

Let us repeat once more that in our opinion crime is not an exclusively biological phenomenon nor the exclusive product of the physical and social environment, but that every crime, trivial or grave, is always the resultant in every anthropological category of delinquents and in every individual of the category, both of a special, permanent or transitory, congenital or acquired abnormality of the organic or psychic constitution, and of external physical and social circumstances which concur in a given time and place in determining the action of a given man. Of this I have furnished a demonstration and an example in my own positivistic researches on the murderer. Let us finally repeat, nevertheless, that in every delinquent whomsoever and in every crime whatever committed by him, the determinating predominance varies, whether it be the predominance of one of the three orders of criminal causation, or the predominance, in either of these orders, of one of the particular causes. Murders committed by the the insane are largely the effect of the psycho-pathological condition of the individual; but this would not be sufficient to cause murder, if it were not, in the first place, of a nature to give the impulsion toward this crime (for otherwise the madman, instead of killing another, would kill kimself or would fall into simple delirium [2]) and unless, in the second place, the physical and social conditions concurred here also, although in a lesser degree.

[1] For instance, while Turati, Colajanni, Tarde, etc., accuse us of being too anthropological, *Brusa*, "Sul nuovo positivismo nella giustizia penale" (Turin, 1887), LXII, charges us with giving too much relief "to natural and social solidarities" while neglecting the individual factors.

[2] This is exactly what Del Greco proved (and I said it in my second edition, 1892, p. 128) by clinical observation in "Il delinquente paranoico omicida" (June, 1894), when he showed that of the multitude of paranoics inmates of his asylum for the criminal insane all in a uniform medium and all with hallucinations of persecution, the majority reacted by depression and plaintive whinings. Some asked aid and pity, and others went as far as insults (injures) and threats: while only a

Ten degrees less of heat, or a few millimeters more of barometric pressure on the particular day might perhaps have prevented the murder. So also, if the victim had not met the madman or if the latter had been better guarded and cared for, the homicide would not have occurred. The same may be said of murder committed through congenital tendencies to savagery, without any clinical form of mental alienation. At the opposite extreme, homicide caused by a political ideal (and not by party revenge) is largely the effect of the political and social conditions of environment. But its complete explanation is only to be had by considering also the physical conditions, the action of which, in this case, will not be obvious and might easily escape notice, although none the less real. A hot wind, an excessive and stifling heat, may diminish the nervous energy of the individual and lead him to postpone his act until to-morrow and to-morrow it may be no longer possible. The victim may have gone away or have been warned. A mild temperature and stimulating air may, on the contrary, heighten the resolution and concur in the execution of a political murder. Nor may one at all disregard the biological factor in this case. It is true that one who commits homicide in obedience to a political ideal has nothing in common with the ordinary criminal, although there are also ordinary insane persons and criminals who, in given circumstances, sometimes perpetrate political attempts, as the effect of a kind of epidemic such as occurred in the religious attempts of the Middle Ages. But even when the political homicide is committed only through the impulsion of an honorable social ideal, the personal factor plays its part, as is sometimes seen in the case where the one selected to accomplish such an act is unable to overcome his repugnance to shedding blood and prefers suicide.

The same may be said of chance murder ("homicide occasionel") which is the consequence of gambling or drink. The proof of it is that not all of those who become drunk or dispute in gaming end by giving knife wounds, even in approximately similar exterior circumstances, or in circumstances in which the differences are at most slight and not proportionate to the varying result between

very small number reached the point of crime (blows, woundings, etc.), or at least would have reached it, if not prevented. Thus, as *Angiolella* says, "Sullo stato actuale dell' anthropologia criminale," in the "Rivista di frenetricia" (1895), p. 180. "The stimulant is the same: the difference is in the individual character which reacts in a different way." See also my report to the Geneva Congress on the "Temperamento criminale," S. P. (June, 1896).

these two extremes: at one extreme animated words, at the other murder. For every attempt, one may, in relation to every criminal, repeat the same observation concerning the individual influences of each of the particular factors, on each subject, at each moment of his life; and one may say generally that, according to the different categories of delicts and delinquents, against the person or against property, against morality or honor, the biological, physical, or social factors predominate differently in the effective determination of the delict.[1]

What we have said of the natural genesis of crime may also be said of every other form of human activity, normal or abnormal. Thus, for instance, one cannot speak of the other great manifestations of social pathology such as insanity, suicide, alcoholism, or vagabondage, nor of the great manifestations of biological pathology of which heredity and contagion are two fundamental conditions of development, without thinking that they are the resultants of the combined action of anthropological factors (hereditary predisposition or momentary disposition of the individual), of physical factors (conditions of the telluric medium), and of social factors (conditions of family life, sensitive, nervous, and intellectual). In this connection it is strange that one of the most incisive of contemporary sociologists, Durkheim, excludes from the causality of suicide, the anthropological factors (heredity and psycho-pathological conditions) and the physical factors (such as the changes of the seasons), notwithstanding that the constantly increasing number of suicides in the hot months depends, for instance, on the debilitation and irritability of the nervous system produced by excessive heat. One should not, however, disregard his explanation, although in itself insufficient, wherein he adverts to the greater length of the days and consequently the greater number of affairs and preoccupations in which the persons predisposed to suicide live.[2]

[1] See my communication to the Criminal Anthropological Congress of Paris, "Sur la valeur relative des conditions individuelles, physiques et sociales qui determinent le crime" (May, 1889); *Dallemagne*, "Théories de la criminalité" (Paris 1896), p. 193, acknowledges that my theory is "one of the most complete" and that complex formulæ like mine "are the only ones that it is necessary to retain and submit to methodical observation and continued analysis." Every day there is an increase in the number of criminal anthropologists and sociologists who accept my synthetic theory (already developed in my first edition, 1881): it finds new applications and proofs in anthropology as well as in criminal statistics and in the juridico-social systems of defense against crime.

[2] *Durkheim*, "Le suicide" (Paris, F. Alcan), p. 97.

§ 77. Social Abnormality of Economics as Basis of Origin and Nature of Delinquency.

Now these considerations on the inseparable concurrence of the anthropological, physical, and social factors in every form of human activity and on the variable importance of each of them in every particular case, not only assist us to develop and give precision to our idea on the origin and nature of criminality but they are useful as well in showing the insufficiency of the other group of hypotheses which are still to be examined. According to many of our critics, and especially those who have rarely or never studied criminals with a truly scientific method and by direct observation, criminality is a phenomenon of exclusively social origin, while showing one or another of the particular aspects which this kind of causes may take. There are some who maintain that the whole social medium is determined by economic conditions, and that consequently crime, in whatever form it presents itself, is but the effect of economic disease. I have so fully discussed this opinion elsewhere that there is no need of repetition here.[1] The Marxian doctrine of historical materialism, which I think it more accurate to call the doctrine of *economic determinism*, according to which the economic conditions of each social group in each phase of its evolution determine, "in the last analysis," as Engel says, that is, directly or indirectly, both the moral sentiments and the political and legal institutions of the same group, is profoundly true. It is the fundamental law of positivistic sociology.[2] Yet I think that this theory should be supplemented by admitting in the first place that the economic conditions of each people are in turn the natural resultant of its racial energies which unfold in a given telluric medium; and by admitting in the second place that the moral sentiments, ideas, and political and legal institutions also have their own relatively autonomous existence, *i. e.* within the limits of the variations of a given economic constitution on which they also have their more or less superficial reaction but which are nevertheless worthy of being noticed.[3]

[1] *Ferri*, "Socialismo e criminalità."

[2] *Ferri*, "Sociologie et socialisme," in the "Annales de l'Institute internationale de sociologie" (Paris, 1894), I, p. 157.

[3] *Ferri*, "Socialismo e scienza positiva" (Rome, 1894), p. 158. As an example, proven by positivistic observation, of the influence of soil and race on the social constitution and on individual physio-psychic nodalities, see *Desmoulins*, "Les Français d'aujourd' hui. Les types sociaux du midi et du centre" (Paris, 1898).

§ 78. Social Abnormality of Juridical Inadaptation as Basis of Origin and Nature of Delinquency.

A view has recently been urged which is in part a repetition of the accurate and well-known idea that the insane, the defectives, and the criminals, are beings relatively or absolutely unfit for social life and which is in part an evident derivation from the Marxian doctrines on the struggle of the classes for economic, and, hence, for political, supremacy. This view is that the delinquent is nothing other than an individual who has not known how or who has not been able to adapt himself to the penal laws which look to the defense of the interest of the dominant class at each historical moment. And this defect of adaptation ends in either direct revolt or in the degeneracy of individuals condemned to an inferior life. It will be more appropriate to speak of this opinion in treating of penal justice and social defense. It will here suffice to call attention to the inadmissable omission of the biological factor, since I can here again repeat: How does it happen that of a hundred individuals who are "non-adapted, or degenerate because of lack of adaptation to the juridical organization," only ten commit crimes while the others commit suicide or become insane? Further, of what use is this hypothesis, when there is a question of crimes which are not directed against the politico-social organization or which are committed to the prejudice, not of the dominant classes, but of the class of the delinquents? And finally, when the penal code punishes homicide and assault without distinction of persons, for instance, where the delinquent and his victim are both paupers, how can it be said that it protects only or preferentially the interests of the dominant class?

§ 79. Social Abnormality of Complex Social Influences as Basis of Origin and Nature of Delinquency.

I consider the opinion inaccurate and prejudiced which holds that crime is the exclusive or even the principal effect of social environment. Tarde sums it up by saying: "A given social organization, a given criminality." [1] This opinion, originated by the

[1] *Tarde*, "Criminalité comparée," p. 28. In connection with Tarde, the contradiction into which he has recently fallen is remarkable. In the matter of criminality, he who preached the social environment as the sole factor of crime so much, reaches the point of examining the social transformism of de Greef (Paris, 1895), where the latter rightly maintains the theory that social transformations are not the work of individuals (great men) but that they have their deep causes

Italians, then taken up by the French and more recently also by the Germans,[1] without any new syllogistic argument and with a complete absence of observation of delinquents and the determinant causes of their anti-social existence, however, has appeared very seductive, not only because of its generality but also because it escapes, they claim, the fatalism of the anthropological social school. In effect, they say, if crime is but the exclusive effect of atavism and pathology, society can do little or nothing to reduce its intensity and extension. On the contrary, in affirming that crime is essentially a social phenomenon, there is also affirmed the comforting possibility of reducing or even eliminating it by improving or changing social conditions. The opinion is accurate in itself, but there is no justification for opposing it to the positivist criminal school, which has never, even through its most specially anthropological representatives, asserted that crime is always and solely a biological phenomenon.

§ 80. Biologico-Social Abnormality as Basis of Origin and Nature of Delinquency.

Yet, aside from this, it is evident that this idea does not explain all the forms of delict and all the categories of delinquents. It considers too exclusively chance criminality ("criminalité oc-

in the economic and moral organization of society. Tarde, who insists in holding to his psychological explanation of social facts (according to which all human evolution depends on invention and imitation, as if those were not superficial manifestations of individual and social life, as I have pointed out in agreement with Durkheim), then comes to the question whether "to be content with terms like *physical medium* or *social medium* or even *economic factor* — *entities which signify nothing* or which may be resolved into accumulated individual actions — is profundity or blindness." "Études de psychologie sociale" (pp. 98–99).

And against Durkheim he strengthens the dose by saying, "It is a fetish, a 'deus ex machina' of which the newer sociologists make use whenever embarrassed, and it is time to brand this abuse which is really becoming disquieting. This explicative talisman is the medium! With this word uttered, all is said. The medium is the formula for everything and its illusory depth seems to conceal the emptiness of the idea" (p. 78). Very well: the observation is partly true. But it is especially so for those who, in speaking of the *medium* in sociology, forget the biological bases of human facts.

[1] *Turati*, "Le delitti e la questione sociale" (Milan, 1883), replies to my articles later gathered in the volume on "Socialismo e criminalità"; *Battaglia*, "La dinamica del delitto" (Naples, 1886); *Colajanni*, "Sociologia criminale"; *Lacassagne*, *Tarde*, *Topinard*, *Manouvrier* in the publications cited above; *Baer*, "Der Verbrecher" (Leipzig, 1893), p. 408; *Gumplowicz*, "Das Verbrechen als socials Erscheinung," in "l'Aula" (1895), No. 14. See also, *Tœnnies*, *Tavares*, *Ferri*, *Garofalo*, *Puglia*, on "Le crime comme phénomène social," A. S. S. S. (Paris, 1896), II, pp. 387 *et seq.*

casionelle") in which we ourselves from the very beginning have always maintained the predominance of the social factors. A sufficient proof of this is our theory of the equivalents for penalty, which we will take up at a later point.[1] This oft-repeated affirmation puts the question badly and the solution is still worse. It is the same as if one were to ask whether the air or the lung contributed most to the life of a mammal. They both contribute and that is the whole truth.

Let us not be told that, admitting this, the social factors are always the real and first causes, because it is from them that individual organic and psychic anomalies and degeneration are derived by hereditary transmission:[2] this would be a Byzantine quibble like the discussion of the priority of the egg or the hen. In the indissolubility and infinite complexity of natural causes and effect, it is an illusory pretension to wish to find first causes, since it is certain that every cause is also an effect and every effect in turn becomes a cause. Moreover, bearing in mind what I have said above; namely, that economic and social conditions are, in their turn, a resultant of racial energies in a given telluric medium, and that there is a relatively autonomous development of each order of social facts in the field of economic conditions, — one sees that it is more positivistic to admit and define by scientific observations the respective and concomitant influences of the different factors of crime, were it only because this bio-sociological diagnosis of crime does not take anything away from the truth of the socialistic prognosis, according to which, in a quite different economic and social environment, wherein every human being would be assured really human conditions of life and, hence, the development of his personality, the epidemic sources of crime would be dammed up, eliminating degeneracy through poverty in the masses and degeneracy through parasitism in the few.

[1] *Post.* By equivalents for penalties, or more exactly, measures to be substituted for penalties ("sostitutivi penali"), the author supposes the writer understands the measures which can be employed in the place of penalties, for the defense of society, by preventing crimes and by making them more rare.

[2] *Loria,* "Le teoria economica della constituzione politica" (Turin, 1886). See also *Mucci,* "Il fattore sociale nella delinquenza secondo la scuola positiva" (Sansevero, 1898); *Stinca,* "Le milieu social comme facteur pathologique," E. N. (October, 1894).

§ 81. Crime is a Phenomenon of Biologico-Social Abnormality.

Hence, in conclusion, we return to our fundamental assertion which should control not only criminal anthropology but all the inductions of criminal sociology: that crime, like all other human acts, is a phenomenon of complex origin, both biological and physio-social, with different modalities and degrees according to the different circumstances of persons and things, of times and places.[1]

[1] It is important in this connection to say a few words of two new scientific drifts of thought pertaining to the relations between biology and sociology: the neo-Lamarckism and the anthropo-sociology. Neo-Lamarckism, which adds to the purely Darwinian theories of natural selection by survival of the fittest the theory of Lamarck on the influences of the medium and of the individual and hereditary adaptation of the beings living in this medium, — is a very accurate conception which has utility in the correction and completion of what was exclusive and unilateral in Darwinism.

This doctrine, while confirming the biological base of social phenomena yet emphasizes the physio-psychic variability of individuals and species according to the variations of the medium and, hence, gives a scientific foundation to the theory of scientific socialism — scientific socialism is a theory which maintains that so-called human nature, declared by some as incompatible with the socialist régime of collective property, is not an immutable entity, but is, on the contrary, the product of biological factors combined with the influences of medium and therefore variable with the latter.

(See *Büchner*, "Lamarck, Cuvier, Darwin, et les néo-lamarckistes," R. R. (1 Aug. 1897); *Setti*, "Il lamarchismo nella sociologia" (Gênes, 1896); *Perrier*, "La réponse de M. Spencer à Lord Salisbury," in the "Revue internationelle de sociologie" (June, 1896); *De Greef*, "Transformisme social" (Paris, 1895), p. 422; *Kunstler*, "Influence du milieu sur l'evolution individuelle," R. S. (19 June, 1897); *Vaccaro*, "Basi del diritto e dello stata." Introduction; *Fages*, "L'evolution du Darwinisme biologique," R. I. S. (July, 1898); *Lombroso*, "Les races et le milieu ambiant," in the R. S. (23 April, 1898).

Anthropo-sociology (aside from the studies on social selection of which I shall speak later), on the contrary, represents an exaggeration, in an anthropometric rather than anthropological sense by reducing all the causes which determine social evolution to the cephalic index of the two alleged ethnic elements of Europe ("homo europaeus," "homo alpinus," besides the "mediterraneus"). It asserts that the brachycephalic represent progressive energy and that the dolico-cephalic represent conservative inertia. It admits, however, that the constant elevation of the cephalic index is a law of anthropo-sociological evolution. Although this drift of thought represents a recall, which is not useless, to the biological or anthropological foundation of social facts, it nevertheless seems evident to me that in its formulae, especially as given by Lapouge, it represents a strange misconception of the complexity of bio-social phenomena which is the most certain induction of contemporary science. It does not seem to me therefore destined (at least in this direction where it has made the most stir) to have a lasting success, and it will doubtless have the same fate as, in an analogous field, did the hypotheses of Weissman whose vogue is past. See *Ammon*, "Die natürliche Auslese beim Menschen" (Jena, 1893); *Lapouge*, "Les sélections sociales" (Paris, 1896); "Les lois fondamentales de l'anthropo-sociologie," R. S. (30 October, 1897), and R. I. S.

We have a last observation to make in this connection. Colajanni thought he struck a fearful blow at the theory of anthropological factors in crime, by establishing (but with many grave errors which I have pointed out in my Italian editions) that "the criminality of a region in Italy is deployed in the inverse ratio to organic degeneracy." In similar fashion, Durkheim, in order to deny that the psychopathic conditions of the individual are among the causes of suicide, remarks that the frequency of suicide is in inverse ratio to that of insanity. Now both of these observed facts, to the extent that they are true, are explicable by the law of compensation between both forms of psychopathic condition. The pathological or degenerative condition which shows itself by crime does not show itself under other forms; or vice versa, if it manifests itself by suicide or insanity or ordinary disease, it in that way eliminates the sources of criminality.[1] Goethe has expressed this in an admirable synthesis which applies alike to individuals and to the population of a whole region and to the collectivity of each social class. He says: "Since the budget of Nature is limited, if she expends too much energy in one direction, she economizes in another."

We have thus finished the examination of the principal objections which, in a more or less positivistic or scientific field, have been urged against the method, the foundation, and the principal data of criminal anthropology. We may therefore conclude that, apart from the inevitable partial corrections, none of the criticisms made is able to take from the data of criminal anthropology that value which it is quite capable of demonstrating by facts while progressing and becoming more perfect every day: and this, in spite of all the criticisms of pure ratiocination, proves that it is advancing, notwithstanding inaccuracies and partial errors, along the great highway of positivistic and fruitful truth. One-sidedness is the organic defect of all the objections made to the data of criminal anthropology. The critics have always wished

(November, 1897); *Ammon*, "Histoire d'une idée d'anthropo-sociologie," in the "Rundschau" (November, 1896), and in the R. I. S. (March, 1898); and *Fouillée*, *ibid*, (May, 1898); *Winiarsky*, "L'anthropo-sociologie," in the "Devenir social" (March, 1898); *Closson*, "La hiérarchie des races européenes" R. I. S.(June, 1898); *Livi*, "La distribuzione geographica dei caraterri antropologica in Italia," in the R. I. S. (July, 1898).

And for criticism, *Loria*, L'antropologia sociale," in the "Rivista moderna (December, 1898).

[1] A similar idea is maintained by *Marandon de Montyel*, "Rapports de la criminalité et de la dégénerescence," A. A. C. (May, 1892).

to assume, for the convenience of controversy, that the new science considers crime as a solely and exclusively biological phenomenon; whereas, from the beginning, its founders, while provisionally separating for exigent reasons of study this or that side of the criminal phenomenon, have nevertheless always affirmed its complex natural determination, both in the biological order and in the physical and social orders. Criminal sociology is inseparable from criminal biology; and such, affirmatively, is the last result of our study.[1]

[1] This is also what is thought by *Sergi*, "Attorno alla sociologia criminale," in the R. I. S. (November, 1897), and in "I dati antropologici in sociologia, *id.* (Jan., 1898); and by *De Luca*, "Antropologia criminale e scuola positiva," S. P. (January, 1898).

CHAPTER III

NATURAL CLASSIFICATION OF CRIMINALS

Precedent. Habitual and occasional criminals. Five fundamental categories: Insane, born, habitual, occasional, and by passion. Gradation. Numerical proportions. Other classifications. Conclusions.

§ 82. History of the Distinction of Criminal Categories Prior to Lombroso.

As I have said, Lombroso, in the first and even in the second edition of his work, had attributed indiscriminately to the whole class of delinquents the sum total of abnormal characteristics. He thus made the criminal man, "uomo delinquente," a sort of abstract type like Quételet's average man, "homme moyen." On the contrary, it has been generally observed that only some of the criminals present the sum of abnormalities, and that it is therefore necessary to recognize different categories among them, in order exactly to define the real range of this anthropological material. It is true that this idea of the distinction to be made among criminals was announced by several observers even before Lombroso, but it was received in criminal sociology only when my criticism of Lombroso's work afforded occasion explicitly to insist on it and to make it less incomplete.

Before Lombroso's time, I find that Gall, for example, as early as 1825, speaking of remorse in criminals, notes the distinction between those who are carried away by passion and those who obey innate instincts.[1] Toulmouche, in 1836, and a little earlier Diey, gave the first indications of a distinction between delinquents who have been urged to crime by poverty, ignorance, evil counsel, or violent passions, and those who are originally vicious, dominated by a sort of instinct for fraud, theft, and other crimes, — men "who always resist the controlling influences of any moral régime." [2]

In 1840, Fregier, relying upon the memories of Vidocq, who

[1] *Gall*, "Sur les fonctions du cerveau" (Paris, 1825), I, 352.

[2] *Toulmouche*, "Travail historique statistique, médical hygiénique et moral sur la maison centrale de Rennes," in the "Annales d'hygiene publique" (1835), XIV, p. 54.

was a convict before he was a police agent,[1] distinguished different kinds of criminals, describing the various criminal specialties and grouping them into three great categories: professional thieves, chance thieves ("voleurs d'occasion") through weakness of character, and thieves through necessity. And he finally divided them into two groups by their greater or lesser repugnance to the shedding of blood in the commission of their thefts.[2] This purely descriptive classification was reproduced and supplemented by Du Camp, who separates, according to the jargon of the criminals themselves, the "basse pègre" (non-sanguinary and non-violent thieves) from the "haute pègre," represented by the "escarpe," who is "the type of a cold and systematic tendency toward assassination," who kills first and then robs.[3] Lauvergne also distinguishes different categories in murder and rape according as the crime has been committed through impulse ("entraînement") or an undeveloped will ("volonté arrêtée"), or through innate brutal instincts.[4] Then come the classifications of Ferrus,[5] Despine, Thompson, Maudsley, and Nicholson, who, taking intellectual development as the distinctive criterion, reach a distinctive between accidental and occasional delinquents and real and habitual criminals, a truly fundamental distinction which was afterwards taken up by many other observers of prison life, such as Valentini, Bittenger, Sewichey, Sollohub, Hastings, Du Cane, Guillaume, Virgilio, Morselli, Michaux, Petit, and Hurel.[6]

[1] "Mémoires de Vidocq" (Paris, 1828), and "Reflexions sur les crimes et les recidives" (Paris, 1844).

[2] *Frégier*, "Des classes dangereuses de la population" (Brussels, 1840).

[3] *Du Camp*, "Paris, ses organes, ses fonctions et sa vie," in the "Revue des Deux Mondes" (1869), and (Paris, 1875), vol. III, cap. XII, § 2.

[4] *Lauvergne*, "Les forçats" (Paris, 1841), Caps., IV, VIII.

[5] *Ferrus*, "Des prisonniers" (Paris, 1850), p. 185; *Despine*, "Psychologie naturelle" (Paris, 1868), I, pp. XII, XV; II, pp. 1, 169, 279; *Thomson*, "The Psychology of Criminals," (1870); *Maudsley*, "Responsibility in Mental Disease," pp. 30–33; *Nicholson*, "The Morbid Psychology of Criminals" J. M. S. (1872), p. 222, and (July, 1874), pp. 167, 168.

[6] *Valentine*, "Das Verbrecherthum im Preussischen Staate nebst Vorschlägen zu seiner Bekämpfung" (Leipzig, 1879), pp. 110–165; *Bittenger Sewichey*, "How far is Society responsible for crime?" R. C., I, 156; *Sollohub*, "La questione carceriara in Russia," *id.*, III, 77; *Hastings*, Address before the Society for the Advance of the Social Sciences; *Du Cane*, "Judicial statistics" (1873), *id.*, V, 155; "The Punishment and Prevention of Crime" (London, 1885); *Guillaume*, "Le cause principali dei criminali ed il mezzo più efficace per prevenirli," *ibid.*, VI, 46; "Comptes rendus du congrès penitentiare de Stockholm" (Paris, 1879), I, 469; *Virgilio*, "Sulla natura morbosa del delitto," R. C., IV, 335–336; *Morselli*, "Del suicidio dei delinquenti," R. F. (1875), p. 247; *Michaux*, "Étude sur la question des peines"

§ 83. Conclusions from History of Distinctions of Criminal Categories Prior to Lombroso.

From these labors which preceded the work of Lombroso we may detach three instructive facts.

A. The persistence, especially among men of experience, directors of prisons or prison doctors, of the idea that there are always some of the delinquents who are incorrigible and unyielding to the action of any penitentiary régime, mild or severe. This idea, while combated by moralists and jurists, far removed from the observation of prisoners, has been given the most positive confirmation and the most luminous explanation by anthropological researches.

B. The supremacy, in the different classifications of delinquents, of criteria of simple prison discipline or purely descriptive variety, to the detriment of criteria really based on the origin and causes of crime It is the latter that are important to the criminal sociologist, since he must seek the causes to find the remedies.

C. The persistence of the intuitive distinction between the two great categories of habitual delinquents and occasional delinquents. If, as Sergi [1] says, the character of every individual is the result, so to speak, of the superposition of different strata, from the primitive and savage to the more recent and civilized, one can easily understand how, in present society, the individuals whose organic and psychic constitution is made principally of the deeper and more anti-social strata, must show in a permanent way, a corresponding activity, which is the index and the effect of their constitution; and hence they are the delinquents by congenital tendency, the incorrigibles. On the contrary, the individuals whose constitutions are normally formed, in greater part, from the more recent and social strata, are sometimes, in case of extraordinary stress ("entraînement"), overthrown by the volcanic eruption, as it were, of the deep anti-social strata and thus become accidental and occasional delinquents. Even among the Romans there was an inkling of this fundamental distinction [2] and later in the Medieval theory of the "con-

(Paris, 1874), p. 77; *Petit*, "Rapport sur la suppression de la recidive," in the "Bulletin de la Société générale des prisons" (Paris, 1878), II, 168; *Hurel*, "Coup d' oeil psychologique sur la population de la maison de Gaillon," A. M. P. (1875), I, pp. 161 and 374.

[1] *Sergi*, "La stratificazione de la delinquenza," R. F. S. (April, 1883), and *Ferri*, "Socialismo e criminalità," Cap. III (Education and Criminality).

[2] *Carmignani*, "Teoria della leggi di scienza sociale," 1, III, Cap. XI, 2.

suetudo delinquendi," when different Italian and French [1] statutes, Article 161 of the Carolina and the jurisprudence of the practitioners [2] had established the death penalty for theft thrice repeated, because, as Farinaccio said, "delictorum frequentia delinquentis incorreggibilitatem denotat." This distinction has been embodied in the modern law of England,[3] a country where it is not necessary to surmount the authority of strongly developed juridical theories and where, consequently, the practical necessities of life are more promptly impressed upon the lawmakers of a positivist people. In fact, there have already been realized in that country criminal reforms which would seem, and do seem, to us Latins and men of theory, like sacrilegious encroachments upon the abstract principles which we have imposed upon ourselves and which we would see triumph even over the evident necessities of every-day life. Finally, this distinction has been judged natural by some theoretical criminalists far removed from anthropology, such as Rossi,[4] Carrara, Ortolan, Wahlberg, Brusa; but nevertheless, guided only by an abstract intuition and a lesser familiarity with the positivist method, they have been unable to draw from it any systematic conclusions helpful to the social defense against crime.

These are conclusions of fact drawn from the first observations on crime and criminals that now confirm once more my induction on the different categories of criminals, an induction by which the scientific and practical range of anthropological data can be exactly demonstrated.

[1] *Hoorebeke*, "De la recidive" (Ghent, 1846), p. 75.

[2] *Claro*, "De furtis"; *Gandino*, "De furta et latris"; *Gothofredo*, "In legibus 3, Cod. de episco. aud.; *Farrinaccio*, "Practio criminalis," Quaest. 23; "De delictis et poenis," Quaest. 18.

[3] Habitual Criminals Act (1869), and Prevention of Crimes Act (1871), which put under police surveillance all persons of evil life, recidivists, etc. In 1856, the Parliamentary Commission of Inquiry on the results of the law of 1853 relative to conditional liberty, recommended that habitual delinquents should be excluded from the benefits of the ticket of leave. *Nocito*, "Della libertà condizionale" (Rome, 1880), p. 85. Even in the French law on the deportation of recidivists (May, 1885), and in the recent Italian law on habitual recidivists, this distinction has been recognized, although in an incomplete way. The distinction, as we shall see in Chap. IV, has always impressed itself on the later penal laws (conditional sentence, conditional liberation, imprisonment for an indeterminate period, etc.).

[4] *Rossi*, "Trattato di diritto penale" (Turin, 1856), 1, III, Cap. IV and VIII, pp. 450 and 413; *Carrara*, "Programma," §1067; *Ortolan*, "Elements de droit pénal, 1187; *Wahlberg*, "Das Mass und der mittlere Mensch im Strafrecht" (Vienna, 1878), and in "Gesammelte Kleinere Schriften," I, 136 and III, 55; his report

§ 84. Applicability of Anthropological Data Restricted to Certain Categories.

From the study of works on criminal anthropology and primarily from my systematic observations of convicts from the psychic point of view, I have derived the conviction that these anthropological postulates do not apply, at least in their complete and characteristic entirety, to all those who commit crime. They apply, by accumulating, to only a certain number of these, who may be called incorrigible, habitual, or born criminals. Outside of these is the class of occasional delinquents, in whom the anatomical, pathological, and psychic characteristics which give the typical figure that Lombroso calls criminal man, "uomo delinquente," are not found or are found only in lesser numbers. This separation, which I indicated as early as 1878 in a criticism of Lombroso's work,[1] and more fully developed in an article published in 1880,[2] can be demonstrated conformably to the positivist method by two orders of proofs: 1st, by the synthetic results of anthropological researches on delinquents; 2d, by statistical data on habitual crime ("récidive") and on the forms of delinquency heretofore studied by the anthropologists. As to the results of the researches of criminal anthropology, they show that in the mass of delinquents, there are from fifty to sixty per cent. who have only a few organic and psychic anomalies, while about a third show an extraordinary number and a tenth show none at all.

§ 85. Statistics of Criminal Relapse.

As to the statistical data, the first and most important which present themselves are those which relate to habitual crime. This is the last manifestation of individual tendencies and, hence, of the differing capacity of delinquents for crime, although in the phenomenon of criminal relapse, a large part is due to the social factors, as we shall see in treating of habitual criminals. With

to the Congress of Stockholm on the methods of attacking recidivity, C. R. I. App., p. 169. Professor Wahlberg, of all the classical criminalists, has drawn the most practical juridical consequences from this distinction. He recommends in his work, "Das Mass," not only a special treatment of reclusion for habitual criminals who form a category "sui generis," but also a special measure of punishment. Adhering to the old idea of moral responsibility, but with a practical criterion, he says: "Habitual crime is the expression of a psycho-moral degeneracy in the evildoer which has become permanent and as such is essentially different, both in culpability and in punishability, from the evil onset of the occasional delinquent; *Brusa*, C. R. (Stockholm, 1879), I, 463, 620.

[1] *Ferri*, "Studi critici sull'Uomo delinquente di Lombroso," in the "Rivista europea" (1878), p. 283.

[2] *Ferri*, "Diritto penale ed antropologia criminale," A. P. (1880), I, 476.

reference to the statistics of criminal relapse we are at a disadvantage because of the scarcity and unreliability of the materials, due to differences of legislation, methods, and means of statistical study in various countries which do not always afford even the still imperfect reliability of the system of judical record bureaus introduced in Italy in 1865, or of that of the Danish system of Police Registry.[1] Not only was "the Congress of London forced, for want of documents, to leave many questions unsolved, especially with respect to relapse," as Yvernés remarked at Stockholm, but even to-day we still see as between one country and another certain differences in this matter the real import of which escapes us.[2] In bringing together all the material that I found scattered among scientific works and official statistics for my study of penal law and criminal anthropology, I was able to offer some outline of international statistics on criminal relapse; yet even to-day, after studying other publications, such as the report of Sterlich,[3] and the "Enquête sur la récidive en Europe," made by the "Société générale des prisons en France," [4] I would be unable to enrich it with any important data: therefore I do not consider its reproduction necessary.

§ 86. Criminal Relapse the Rule.

Although it is impossible to fix the maximum of recidivists, it may be said as an approximation which is certainly within the actual figures, that criminal relapse generally oscillates around a percentage of from fifty to sixty in Europe. I say, "certainly within the actual figures," because, for instance, while the decennial statistics of the Italian prisons for the year 1879 gave fourteen per cent. of recidivists in the penetentiaries ("bagnes") and thirty-three per cent. in the other penal houses for men, yet I met with thirty-seven per cent. at the penitentiary of Pesaro and sixty per cent. at the prison of Castelfranco. Even if we should consider

[1] The official figures on criminal relapse are always under the facts because the personal identity of the most cunning and most recidivist delinquents very often escapes the authorities, through their changes of name and even sometimes of their appearance.

I shall speak later of the anthrometric systems of identification of criminals.

[2] *Yvernès*, C. R. (Stockholm, 1879), I, 464.

[3] *Sterlich*, "Statistique de la recidive," report to the International Congress of Statistics at Budapesth (1876). See also, *Földes*, "Die Statistik der Recidivitat in Ungarn," in the "Bulletin du Institute International de Statistique" (1892), VI, f. 1, p. 93; "Einige Ergebnisse der neueren criminalstatistik" ("Die Recidivität"), in the "Zeitschrift für gesammelte Strafrecht Wissenschaft," XI, p. 568.

[4] B. S. G. P. (March, 1878 *et seq.*).

the proportion unusual in these two particular institutions, this clearly shows the insufficiency of the official data on criminal relapse in Italy as well as in all other countries, as pointed out in the criticisms of Köbner.[1] Aside from this general fact, which shows as Lombroso [2] said and Espinas [3] repeated, that criminal relapse constitutes not the exception but the rule in criminal life, we are able to find in statistics an indication of the forms of crime in which criminal relapse is more predominant and where, consequently, one finds the greatest number of habitual or incorrigible delinquents. These are the researches on specific relapse in crime that I began in 1880, in the study mentioned above. I can now supplement them with the aid of more recent material from French statistics, since these permit of making a more accurate and more complete study than do the Italian statistics, where the crimes are massed in more or less homogeneous groups.

FRANCE. RECIDIVIST CONVICTS 1877–1881, COURTS OF ASSIZE

CRIMES (Against the person)	p. 100
Violence against public officers	85.8
Bigamy	59.3
Wounding parents or grandparents	55.9
Riot	55.5
Kidnapping of minors	46.2
Sexual assaults on adults	44.0
Wilful murder (assassination)	42.3
Parricide	41.7
Manslaughter (homicide)	39.4
Sexual assaults on children	38.5
Attempts against railways	37.5
Serious wounds followed by death	36.8
General Average	35.8
Abortion	30.0
Perjury	26.7
Sequestration	18.8
Poisoning	16.7
Infanticide	6.0
Stealing, substitution, or abandoning children	4.9

CRIMES (Against property)	p. 100
Thefts in churches	74.3
Thefts, simple	71.7
Robbery with violence, not on the highway	66.0
Robbery, with violence on the highway	62.4
Burning buildings not inhabited, woods, etc.	59.8
General average	58.5
Barratry	50.0
Theft by servants	44.2
Counterfeiting	43.8
Forgery, private writings	42.5
Burning inhabited dwellings	41.5
Forgery, commercial paper	38.3
Forgery, public documents	37.0
Fraudulent bankruptcy	35.3
Abuse of confidence by domestic servant	32.5
Extortion	30.7
Embezzlement of public funds	28.5
Robbing the mails by postal employees	
Smuggling by customs officers	

[1] *Köbner*, "Organisation de la statistique des récidives," in the "Bulletin de l'Union international de droit pénal" (1895), p. 45. *Garçon*, in scrutinizing the judicial records at Lille, found eighty per cent. of recidivists. B. U. I. D. P. (1894), p. 406.

[2] *Lombroso*, "L'uomo delinquente," 5th ed., I, 471.

[3] *Espinas*, "La philosophie expérimentale en Italie" (Paris, 1880), p. 162.

FRANCE. RECIDIVIST CONVICTS, 1877–1881 (*cont'd.*)

CORRECTIONAL TRIBUNALS

DELICTS	p. 100
Infractions of surveillance	100.0
Infraction of expulsion of foreign fugitives	93.0
Infractions of interdiction to sojourn	89.0
Drunkenness	78.4
Vagabondage	71.3
Begging	65.7
Fraud (escroquerie)	47.8
Insult to public officers	46.8
Forcible entry	45.3
Thefts	45.2
Breach of trust	43.8
General average	41.9[1]
Riot, resistance	40.3
Written or verbal threats	39.6
Prohibited weapons, etc.	37.3
Political, electoral, and newspaper delicts	35.7
Outrage to public morality	34.5[2]
Public outrage to decency	32.2
Voluntary wounds and blows	31.0
Unlawful opening of cafés, inns	27.7[2]
Unlawful practice of medicine or pharmacy	26.6
Contraventions of railway regulations	25.3
Hunting or carrying prohibited arms	24.2
Breach of good morals, tending to corruption	23.8
Simple Bankruptcy	23.6
Insult to ministers of religion	20.4[2]
Fraudulent sales of merchandise	16.7
Defamations, insults, calumnies	14.2
Rural delicts	12.0

§ 87. Proportion of Recidivity in Crimes Against the Person.

In crimes against the person we find that the offenses with a recidivity higher than the average are homicide under the more serious forms and criminal assaults. There are high figures also for violence and resistence to public functionaries (as in Italy), for bigamy, kidnapping of minors, and woundings. But these figures have no great importance except for woundings, which resemble homicides (in the assizes) because they are drawn from very weak statistics or which give very different results. Woundings are, as we shall see, more worthy of attention in the recidivity of crime. Further, these crimes against the person confirm the observation already made, — that simple homicide has fewer recidivists and hence has a more occasional character than qualified homicides; and further, that not all the forms of qualified homicide (for in-

[1] The general average of recidivists among those sentenced by the tribunals varies in the official French statistics, because the percentage is based on the whole number of persons sentenced not only for delicts but also for contraventions (with the exception of forestry contraventions as is said in the Reports for 1877, p. XIX, and 1879, p. 18). I believe that it would be more exact to calculate the percentage on the total of delicts only, which are distinguished in the French statistics, thus eliminating the figures for recidivists of contraventions of the customs laws ("les octrois, douane"), fishing laws, etc.

[2] For 1877–1879 only.

stance, infanticide) belong to habitual criminality. This is because it is the occasion that gives rise to them, as we see also in abortion and abandonment of children. Still, let us note that the lesser number of recidivists recorded for poisoning, depends in my opinion, on other psychological reasons that I have indicated in my study of homicide.

§ 88. Proportion of Recidivity in Crimes Against Property.

In crimes against property theft shows the largest number of recidivists, with the exception of its most occasional forms, such as thefts and breaches of confidence committed by servants. So also, forgery of commercial paper and bankruptcy, in comparison with other frauds and other crimes which depend less upon the sudden vicissitudes so frequent in finance and commerce, show a more occasional character, which reaches its maximum in the embezzlement of public funds or appropriation of postal credits by employes, or in smuggling by customs officials. These offenses, in fact, by the rarity or absence of recidivists, show that they are due rather to occasional temptations than to innate criminal tendencies. In the correctional tribunals in France as in Italy, it is a fact that the most frequent recidivists belong also to habitual criminality (vagabondage, swindling, thieving) except certain offenses which either naturally ought to show a higher recidivity because it is the very condition of their existence, such as in breach of surveillance; or which have the nature of a contravention and may be an accompanying accessory of habitual delinquency, such as drunkenness, insult to public officers, violation of banishment, prohibited residence, etc. Yet, as I have said, these figures partly correct the results relative to certain crimes, since it is here seen that resistance, woundings, and simple thefts, in their more common forms, give a lesser recidivity than in the Courts of Assize just because the mass of simple delicts falling within the jurisdiction of the minor courts (tribunaux) embraces a larger number of cases of a purely occasional nature. The same observation applies to bankruptcies, rural delicts, fraud in mercantile sales, defamations, and insults which constantly approximate the type of the occasional delict.

§ 89. Statistics of Relapse Reinforce Conclusions of Anthropology.

Therefore the statistics of recidivity in general and the statistics of the different kinds of offenses again confirm, in an indirect

way, the observation that of the total number of persons who commit crimes only some show the individual anomalies ascertained and defined by anthropology. The question naturally occurs: To how high a figure does the quota of the most abnormal delinquents rise in comparison with those who are less removed from the normal type? The answer may be given directly by the results of anthropological researches or indirectly by statistical inquiries. As to the former, we are far from having the elements of an exact and complete judgment in the labors of the anthropologist because these proportions naturally vary with the different categories of crimes, since it goes without saying, as I have already observed of the criminal type, that in homicide, for instance, the proportion of very abnormal individuals is much greater than, for example, among the authors of blows and woundings and among thieves.

§ 90. Larger Percentage of Habitual Delinquency.

Nevertheless, taking the number, even in the result given by Lombroso in the last edition of his "Uomo delinquente" as a mere approximation, we may say that the anthropologico-criminal characteristics are met with in a proportion of from forty to fifty per cent. of the total number of criminals.

Colajanni has some objections (derived from his usual syllogistic method and not from experience) to this proportion of habitual delinquency. He says that if the habitual delinquents, that is to say, the recidivists, were subtracted, the born-criminals would make but an insignificant fraction "which a liberal calculation would not bring above five per cent."

Without discussing this very arbitrary figure, it should first of all be remarked that, whatever Colajanni may say, all recidivists are not habitual criminals only, since recidivity is also a peculiarity of born-criminals. Italian judicial statistics for 1887 show that of five hundred and twenty-three prisoners convicted for qualified homicides, eight had previously been convicted of qualified homicide, — a fact of enormous significance even from the standpoint of the defensive efficiency of the penal function. Seventy others had previously been convicted of other assaults against the person; and a hundred and six for offenses of other kinds. Of one thousand six hundred and ninety-four convicted of simple homicide, sixty-three were recidivists of homicide; a hundred and eighty-eight were recidivists of other assaults against the person; and

three hundred and six of other crimes.[1] This proves, therefore, that these, who were for the larger part born-criminals, rather than delinquents by acquired habit, also showed a higher ratio of recidivity. That born-criminals and habitual criminals furnish forty or fifty per cent. of the mass of delinquents, is a conclusion that finds support in the following fact: Born-criminals and habitual criminals have a delinquency which is peculiar to them and which statistics and the studies of criminal anthropology fix in a certain few forms of crime which are typical of them.

Outside of these forms, criminal science knows a very much larger number of delicts. Ellero in his critical study of the German penal Code said that he had counted two hundred and three kinds of offenses, both crimes and delicts.[2] I, myself, find that there are in the Italo-Sardinian Code about a hundred and eighty crimes and delicts, about a hundred and sixty in the Tuscan Code, about a hundred and fifty in the French Code, and two hundred and one in the new Italian Penal Code. The forms peculiar to congenital and habitual delinquency embrace about one tenth of the total of classified delicts. It is not difficult to believe that, as a general rule, the delicts committed by incorrigible or habitual criminals are not often political offenses nor delicts of the press. Nor are they delicts against religion, corruption of public offices, bribery, embezzlement, usurpation of titles, or abuse of authority; nor slanders, perjuries, subornation, adulteries, incests, and rapes; nor infanticides, attempts at abortion, substitution of children; nor disclosure of secrets; nor refusal to do required service; nor damage to real property, bankruptcies, violations of domicile, obstructions to the exercise of political rights; nor illegal detentions, duels, insults, defamations, and the like.

Aside from the criterion of classification, statistics must be taken into account, in order to see to what extent the forms of habitual delinquency enter into the total, it being, of course, understood that the relative frequency has a large variation for each delict. With this object in view I took occasion, in the study cited above, to make some researches of which I give here the most important conclusions.

[1] See *Bodio*, "Relazione della delinquenza nel 1887," in the "Atti della commisione di statistica giuridica" (Rome, 1889).

[2] *Ellero*, in the "Opuscoli criminali" (Bologna, 1874), p. 457.

Habitual Delinquency	Italy			France			Belgium		
Wilful Murder, Manslaughter, Robbery, Association of Criminals, Rape, Brigandage, Arson, Vagabondage, Swindling, Forgery.	Assizes	Tribunals	Total	Assizes	Tribunals	Total	Assizes	Tribunal	Total
Relation of habitual delinquency to the total number of convicts	% 84	% 32	% 38	% 90	% 34	% 35	% 86	% 30	% 30

That is to say, in the mass of convicted delinquents there is an habitual delinquency of about forty per cent. in Italy and a trifle less in France and Belgium. This difference is partly due, as to Belgium, to the fact that vagabondage is not included; but more especially to the fact that in other countries certain forms of habitual criminality are less frequently met with. These are unfortunately much more frequent in Italy, such as homicide, armed robbery, and associations of criminals.[1] This difference in the totals, increasing for Italy and decreasing for France and Belgium, has a more important significance. In Italy the increase can only be explained by a stronger proportion of the forms of habitual delinquency, which is all the more serious since we observe an increase, also, in the occasional and contraventional forms of criminality, whilst in France and Belgium the proportional diminution of habitual delinquency may depend upon a real decrease in that form or, on the contrary, to an increase of occasional and contraventional crimes, either by an actual growth in numbers or by the effect of new laws.

§ 91. Percentage in Habitual Delinquency Between "Assizes" and "Tribunals."

Another fact is shown by this table; namely, that habitual delinquency, in Italy as well as in France and Belgium, is more frequently met with in the delicts within the jurisdiction of the

[1] The same calculations made for the years 1891–1895 would give a total of 44 per cent. for Italy; in France 96 per cent., in the Assizes, 25 per cent., in the Tribunals, and a total of 26 per cent.; in Belgium, 95 per cent. in the Assizes, 25 per cent. in the Tribunals, and a total of 25 per cent.

[2] This difference in totals — an increase for Italy and a decrease for France and Belgium — has, however, a different significance in the two cases. In Italy the increase can only be accounted for by a greater proportion of the forms of habitual deliquency, which is all the more serious since we find there also an increase in the occasional and contraventional forms of criminality; whereas,

Assizes (except cases of robbery and vagabondage) because the Assizes try principally cases which are at the foundation of primitive criminality, — of the criminality which is most natural to the quasi-savage and to the man least changed by the progress of social life.

If we should now seek the proportions in which habitual delinquency is distributed between the Assizes and the Tribunals we would find that the latter pass on a greater number of cases belonging to their jurisdiction, because, as in the zoölogical scale there is greater fertility in the lower degrees, so in the criminal scale the less serious delicts, such as swindling and vagabondage, are likewise more numerous. For example, in the thirty-eight per cent. of habitual delinquency which is the total for Italy, thirty-two per cent. belong to the Tribunals and only six per cent. to the Assizes; in France with a total of thirty-five per cent. thirty-three per cent. are in the Tribunals and two per cent. in the Assizes; in Belgium with thirty per cent., twenty-nine per cent. belong to the Tribunals and one per cent to the Assizes. Now, if in the figures for habitual delinquency such as they are found in the total of persons convicted by the Assizes and Tribunals, the effective numerical frequency were observed, it would be found that thefts ("vols") are the most numerous in Italy (twenty per cent.) as well as in France (twenty-four per cent.) and Belgium (twenty-three per cent.). Starke found the same thing in Prussia where unlawful appropriation of property forms thirty-seven per cent. of the total delinquency.[1] In the second rank in Italy come vagabondage (five per cent.), the different homicides (four per cent.), swindling and fraud (three per cent.), robbery with violence (two per cent.), forgery (0.9 per cent.), violations and associations of criminals (0.4 per cent.), and in the last place, arson (0.2 per cent.).[2] Similar figures are found in France and Belgium for vagabondage

in France and Belgium the proportionate decrease of habitual delinquency may depend either on a real decrease in this habitual delinquency or on an increase of occasional and contraventional delicts, as a real increase of number or as the effect of the creation of new laws.

[1] *Starke*, "Verbrechen und Verbrecher in Preussen, 1854–1878" (Berlin, 1884), p. 92.

[2] *Beltrani-Scalia*, "La riforma penitenziaria in Italia" (Rome, 1879), pp. 82, *et seq.* See also *Bournet*, "De la criminalité en France et en Italie" (Paris, 1884), and the official volume "Movimento della delinquenza nel 1873–1884, con. Appunto, di statistica internazional" (Rome, 1886), which was published on my initiative by the commissioner for judicial statistics. See also the later volumes of criminal court statistics. See also *Bosco*, "La delinquenza in alcuni stati d'Europa" (Rome, 1899).

and for swindling, while assassinations, homicides, brigandage, arson, and associations of criminals are much less. The inverse is true of violations which are more common in France (0.5 per cent.) and in Belgium (one per cent.) than in Italy. On the other hand, the curious observation is made in Italy that during the period of forced currency, which lasted until 1900, and which put a much greater quantity of paper money in circulation, there was a larger proportion of counterfeiting (0.4 per cent.) than in France (0.09 per cent.) and Belgium (0.04 per cent.); and thus the barren figures prove that I was right when I said elsewhere what I shall have occasion to say again further on: that in order to diminish the crime of counterfeiting, the substitution of coin for paper money is more effective than the maximum of hard labor.

§ 92. Five Categories of Criminals.

Having thus demonstrated by means of anthropology and statistics the reality of this basic distinction between habitual and occasional delinquents of which so many observers had already an intuition, but which had as yet taken no definite form, we have established the starting-point for those successive distinctions which the study of facts led me to introduce into criminal science and which have since been accepted under more or less different names by all experts in criminal sociology.

These ulterior distinctions are determined by the criteria of fact which follow. First of all in the mass of habitual delinquents there are presented those who are affected with an obvious and clinical form of mental alienation from which proceeds their criminal activity. In the second place, among the habitual delinquents who are not mentally affected, little as one may have visited the prisons and studied delinquents from the sociological standpoint, one finds a class of individuals physically and morally ill-favored from birth, who live in crime by reason of a congenital necessity of organic and psychic adaptation, and who are closer to insanity than to normal reason. This category is distinguished from another class of individuals who also live in crime and by crime owing to the predominant influence of the social environment in which they were born and have grown up, — an influence always found together with a wretched organic and psychic constitution. These individuals, however, once having reached the state of chronic crime, are incorrigible and degenerate like the other habitual criminals; but, before the descent from the first

crime to the depths, they could easily have been saved by preventive institutions and by a medium less profoundly vicious.

Moreover, in the class of occasional delinquents a special category is distinguished, less by different characteristics than by the typical exaggeration of its organic and psychic characteristics hence, almost exclusively by differences in degree — greater or less. In all of these individuals it is rather the impulsion of occasion than innate tendency which determines the crime. With the majority the determining occasion is a quite common, or, at least, a not too exceptional stimulus, — but for some, on the contrary, the stimulus is an outburst of extraordinary passion, a psychological tempest which of itself can carry them to the point of crime. Some of these individuals are normal men; others who, so to speak, complete the circle are in a class, as Delbruck, and Baer [1] have said, which is closely related to that of the criminal insane, if not with a permanent form of derangement at least with a lack of psychic equilibrium, which, at first more or less latent, finally breaks out in a criminal attempt.

The whole mass of delinquents classify themselves into five categories which as early as 1880 I designated as follows: Criminal-insane — criminal-born — habitual criminals or criminals by acquired habit — chance criminals ("d'occasion") — criminals by passion.[2]

§ 93. The Criminal Insane.

As I have already said, criminal anthropology will not have reached its definite phase until it shall advance by biological, psychological, and statistical biographies in each of these categories, giving to each in a qualitative and quantitative way psychological characteristics with a greater precision than now

[1] *Baer*, "Le prigioni ed i sistemi penitenziari," reviewed by *Roggero* in the R. C., pp. 346 *et seq.*

[2] The term criminal-born ("delinquente nato") so much discussed and now accepted in ordinary language since it responds to constant observations of daily life even by those who are strangers to anthropological science, was first given by me in 1880, "Diritto penale ed anthropologia criminale," A. P., I, 474, for the following consideration: "There is not much precision in the term 'habitual criminal' as indicating the type of man who because of a bad physical and psychic organization, is born, lives, and dies delinquent: in reality he is such from his first delict (often committed in infancy), that is, from a time when there cannot yet be any question of the habit of crime. It would be more accurate to call him an incorrigible delinquent or a born-delinquent, thus indicating a condition which is established with the first misdeed, when the culprit shows those anthropological characteristics which make of him a separate type." The term "criminal-born" has indeed been fortunate.

obtains, since the present observers give characteristics for a whole mass of delinquents who are distinguished only by the legal form of the crime committed and not according to their bio-social type as well. In the works of Lombroso, Marro, and others and even in my "Omicidio" to a considerable extent, the characteristics are indicated either for the total or else according to the legal categories of delinquents (murderers, thieves, forgers, etc.), in each of which categories there are born-criminals, habitual criminals, occasional or chance criminals, and insane criminals. It follows that there are either partial disagreements between observers, or at least a kind of average in the characteristics of each anthropological class of criminals. Now, in consequence of the studies that have been made and especially since my studies on hundreds of delinquents, ordinary madmen, and normal persons, we are able to point out here the general lines which distinguish these five anthropological classes of delinquents. First, it is evident that in a classification of delinquents which does not limit itself exclusively to the technical field of criminal anthropology and which must afford a positive base for the inductions of criminal sociology, the category of the *criminal insane* is fully entitled to a place. There is no necessity to be long with the objection that Joly [1] has again recently made me, wherein he claims that the term — criminal-insane — is a contradiction of terms because the insane are not criminal as they lack moral responsibility. I shall make reply to this assertion, which is inspired by the traditional spiritualism, in treating of social accountability[2] which applies even to the criminal insane. In the meantime, when speaking of insane persons who commit some of those acts which if committed by sane men would be called crimes, we shall consider the term in its objective sense which is not open to discussion. Nor should we halt on the objection made by Bianchi, among others, at the Criminal Anthropology Congress of Rome; [3] namely, that the criminal insane belong to psychiatry. The fact that psychiatry is concerned with them from the standpoint of psychopathology does not prevent criminal anthropology and criminal sociology from being occupied with them, either in every form of natural study of the criminal, or in indicating measures concerning them in the interest of public safety.

[1] *Joly*, "Le crime," p. 62.
[2] See Chap. III, *post*.
[3] A. C. A. C., 137.

Among the criminal insane there is a whole variety, recognized since the studies of Lombroso[1] and since the quasi-unanimity of the Italian psychiatrists shown at the Phreniatrical Congress of Sienna,[2] which is not distinguishable from that of real born-criminals. These are the morally insane afflicted with the hitherto little-defined phrenopathic form to which science has given so many names, from "moral imbecility," used by Pritchard, to "reasoning insanity," employed by Verga. This mental infirmity, which has been recently studied, especially in the works of Mendel, Degrand du Saulle, Maudsley, Krafft-Ebing, Savage Hugues, Hollander, Bonfigli, Tamburini and Seppilli, Bonnecchiato, G. B. Verga, Salemi, Pace, Bleuler, Barr, Waggoner, and others, consists in the last analysis in the absence or atrophy of the moral sense (which I prefer to call the social sense of what is permitted or forbidden). It is most often congenital but sometimes acquired. It coexists with apparent integrity of logical reasoning and presents the fundamental psychological condition of the born-criminal. This is an observation of the greatest importance in avoiding the easy misapprehensions into which certain critics of the positive school have fallen. In failing to note the absolute difference between the morally insane and ordinary madmen they have revolted against a pretended "identification between criminals and madmen" which has never had any place in the inductions of criminal anthropology. Aside from morally insane persons who are indeed rare and who, as Lombroso and Krafft-Ebing remark, are more often sent to prison as delinquents than to special houses as patients, there is a whole phalanx of unfortunates who are afflicted with a common and more or less apparent form of mental infirmity. In this pathological state they commit crimes sometimes atrocious in the cases for instance of idiocy, the mania of persecution, violent mania, epilepsy, or in attempts against property and morals; also in cases of general paralysis, epilepsy, and imbecility. A general description of these numerous and very different kinds of insane cannot be given here because their organic and especially psycho-pathological characteristics are not only at the same time identical and

[1] *Lombroso*, "Pazzia morale e delinquente nato," A. P., vol. I (1884); "L'uomo delinquente" 4th ed., I, pp. 584 *et seq.*

[2] "Atti del quinto congresso freniatrico" (Milan, 1887), pp. 64, 223 *et seq.* See also the critical study of *Tanzi*, "Pazzi morali e delinquenti nati," R. S. F. (1884), and *Tamburini*, "Contribution à l'étude de la delinquence congenitale et de la folie morale," A. C. A. C. (Rome, 1887), p. 431.

opposed to those of non-insane criminals, but also, and especially, because these characteristics often vary with the different forms of mental malady and hence, as Lombroso also thinks,[1] they cannot be gathered into a single type as can be done for the other categories of delinquents.[2]

§ 94. The Mattoide and Semi-insane Categories.

Besides the really insane, who are, as I have pointed out and been confirmed in by others, only an exaggeration of the born criminal type,[3] this category also embraces the delinquents who are neither completely sane nor insane and belong to what Maudsley called the "intermediate zone." Lombroso denotes them with the term "mattoides" which is now part of ordinary language since it expresses in a popular untechnical form an indisputable fact. It is really a mere prejudice to believe that there are found in nature the precise distinctions to which human language is forced to resort and that, for instance, in the present case there is a clean-cut difference between the sane and the insane. No, there is a shading of tints where we pass from one to the other by transitions which are difficult of determination.[4] Types of these half-insane delinquents are afforded us by those who finish their existence with a crime, often political in character or appearance. Their lives have been full of extravagances which are often characteristically expressed in a mania for writing and publishing a flood of pamphlets, wherein, in spite of only the most rudimentary education, they treat of the highest topics. Such are the Lazzarettis, the Magiones, the Passanantes, the Guiteaus, the Macleans, etc. It is the half-insane who commit the most atrocious and repelling crimes of bloodshed with a coolness which proceeds from their pathological organization, and without any apparent motive or without a motive proportionate to its effect. And yet the classical criminalists find in them the maximum of "moral liberty" and of responsibility when they speak of homicides committed "without cause" or simply through "brutal perversity" or through a

[1] "L'Uomo delinquente," 5th ed., II, 480.

[2] For an analytical description of the criminal-insane, see *Lombroso*, "L'uomo delinquente," 5th ed. II, 266 *et seq.*; and for insane murderers, see my "Omicidio" (the psycho-pathology of homicide).

[3] *Lombroso*, Preface to "Duecento criminali e prostitute," by *Ottolenghi* and *Rossi* (Turin, 1898), p. VI.

[4] *Cullerre*, "Les frontières de la folie" (Paris, 1888); *Parant*, "La raison dans la folie" (Paris, 1888); Soury, "Étude sur la folie héréditaire" (Paris, 1886).

sort of "sanguinary erotism" or through "hatred for humanity." We find other examples among those whom alienists call necro-philo-maniacs who are equally impelled to murder or rape — like that Sergeant Bertrand who dug up bodies to violate them, — or Verzeni who violated women after having strangled them, — or Menesclou who was sentenced to death at Paris for hacking to pieces a little girl of seven after he had violated her.[1]

Finally, a large contingent is furnished to this category by those who are afflicted with hereditary insanity and epilepsy, under forms of these maladies which are much more frequent than is generally believed, and to which the latest results of psychopathology reduce the greater part of those strange forms of alienation that were formerly called temporary insanity and in which various kinds of monomania are observed. One of these latter, "misdéisme," deserves mention. It is the kind of homicide with the massacre of several persons, committed generally by soldiers on their comrades or on their superiors, without any apparent serious motive. This is certainly an expression of epilepsy among individuals whom a more careful and a more rigorous examination before enlistment would have kept out of the service, and would avoid the frequent repetition of these tragedies, which it is absurd, as well as useless, to persist in combating with the death penalty. In this connection we should recall that Lombroso, although at first identifying moral insanity with congenital delinquency, finally traced both to epilepsy, making, as I had already declared, the epileptoid constitution the common base of all forms of delinquency. Certainly the positive proofs advanced by him are so numerous and agree so well that after the first objections, which were inevitable and which were made also to the assimilation of the morally insane with the born criminal, this view will finally be definitely conceded, or, at least essentially. Already in practice it seems to explain certain strange and savage crimes wherein one very often finds traces of the epileptic temperament of which formerly one never thought except in the most pronounced and rarest cases.[2]

[1] *Viazzi*, "Sur reati sessuali" (Turin, 1896), Cap. XII; *Krafft-Ebing*, "Psycopathia sexualis" (Stuttgart, 1886), and all the rich bibliography from Westphal to Raffalovich, on sexual perversion, in *Ferri*, "L'Omicidio," pp. 624, 662.

[2] *Lombroso*, "Uomo delinquente," 4th ed., I, 631 *et seq.*; I, 116. See also *Frigerio*, "De l'epilepsie et de la folie morale dans les prisons et les asiles d'aliénés," A. C. A. C. (Rome, 1887), pp. 212 *et seq.*; *Tonnini*, "Le epilessie" (Turin, 1886); *Sighicelli et Tamboni*, "Pazzia morale ed epilessia," R. S. V. (1888); *Venturi*,

§ 95. The Born-Criminal Category.

Finally comes the category of the *criminal-born* which is, properly-speaking, made up of those in whom there is observed clearly the special marks revealed by criminal anthropology. These are the types of men, either savage and brutal or polished and idle, who are unable to distinguish murder, robbery, and crime in general from honest industry. They are "delinquents just as others are good workmen"; [1] and have ideas and sentiments on crime and punishment entirely opposed to those which legislators and criminologists think they have. With these delinquents, a penalty suffered has, as Romagnosi [2] said, less effect than a penalty which threatens. It has, in fact, none at all because they consider prison as a refuge where food is assured them even in winter without need of much labor and more often with enforced idleness; or, at the most, as a risk inseparable from their criminal industry, just like any other risk, such as falling from a false work which is incurred by a mason or the risks incurred by railway servants.

These with the habitual delinquents constitute, under the two characteristic and opposed types of murderers and thieves, the phalanx of those who, scarcely released from prison, again commit crime and are eternal pensioners of all the houses of detention. Well known to police and the courts, they count their convictions for trifling offenses by the dozen or more. Against these, the legislator, closing his eyes to daily experience, persists in the useless and costly fight between penalties which cause no fear and delicts ceaselessly repeated.[3] The idea of a born-criminal (who is criminal by the inexorable tyranny of congenital tendencies) is certainly contrary to common opinion, which insists that every man should impute his conduct to his free will or at most to a defective and badly directed training rather than to the ordinary composition of his organic and physical constitution. It thus lends itself to facile and oratorical contradictions. Further, the

"La epilessia vasomotoria," A. P. (1889), p. 28; *Baker*, "Some Remarks on the Relation of Epilepsy and Crime," J. M. S. (July, 1888); *Féré*, "Les epilepsies et les epileptiques" (Paris, 1890); *Ottolenghi*, "Epilessie psichiche" (Turin, 1893); *Roncoroni*, "Trattato clinico della epilessia" (Milan, 1894); *Peixoto*, "Epilepsia e crime."

[1] *Fregier*, "Les classes dangereuses," p. 175.

[2] *Romagnosi*, "Genesi del diritto penale," §1493.

[3] *Wayland*, "I delinquenti incorreggibili," in the R. C. (1888), p. 558; *Sichart*, "Criminels incorrigibles," in "Bull. comm. pénit. intern." (April, 1889).

incompetents who visit the prisons are unable either to find or see these types of delinquents; and this is partly, as l'Abbé Crozès (who observed and knew the prison world to the very bottom) has very well shown. He says: "these incorrigibles are ordinarily inoffensive and often useful prisoners, and have only the best relations with the keepers and directors, who say of them: 'He is a good prisoner who listens to reason, and would not harm a fly.' Prison life is no suffering for them: they are there 'like the painter in his studio where he thinks of new master-pieces." [1] But this same common opinion when it is not preoccupied with the dreadful and imaginary consequences of the irresponsibility for crime committed under such conditions, recognizes, at least in the evident cases, that there are men born for crime whose anti-human conduct is the inevitable effect of an indefinite series of hereditary influences which accumulate in the course of generations. This is proven by the success which has attended in ordinary language my expression, the *born-criminal.* Science, moreover, to which in the end the common opinion surrenders, has gathered such convincing proofs of this idea; practical life has so confirmed it with the general testimony of prison directors and prison doctors, that the fact will surely be impressed upon legislators, unless they wish to imitate the hen which after hatching ducklings undertook to correct them of their innate desire to swim by pecking them every time they came out of the water, — a process which did not prevent their immediate return in spite of her.

§ 96. The Habitual Delinquent Category.

In the third place is the category of delinquents whom, as the result of studies principally made in the prisons, I have called habitual delinquents or delinquents by acquired habit. These individuals show in an indistinct way, if at all, the anthropological marks of the born-criminal. The first crime is committed very often at a tender age and almost always against property and less through innate tendencies than through the moral weakness peculiar to them, to which is added the impulsion of circumstances and a corrupt environment which constitute a true center of criminal infection. Often, also, as Joly [2] observes, they are encouraged by the impunity following their first faults and persist

[1] *Moreau,* "Souvenirs de la petite et de la grande Roquette" (Paris, 1884), II, 440.

[2] *Joly,* "Le crime," Cap. IV.

in crime, which then becomes a chronic habit and a real profession. This comes from the fact that detention in common corrupts them morally and physically, confinement in cells stupifies them, alcoholism brutalizes them, and society, abandoning them after as before their liberation, to wretchedness, idleness, and temptation, does not help them in their struggle to re-enter the conditions of honest life. "Society may even have forced them to fall back into crime by certain institutions such as segregation, admonition, and surveillance, which ought to be preventive but which, on the contrary, are new causes of crime." Adults and even youths are sentenced ten, twenty, and thirty times to short terms, generally for theft or vagabondage, and this simply because after their first crime, admonition and surveillance together with the corruption of the so-called houses of correction and prisons deprived them of every means of honestly gaining their living. Judges and lawyers know it well. They know that with these badly combined social mechanisms Thomas Moore was right in saying "What are you doing but making thieves in order to have the pleasure of putting them in prison?" It is precisely the thieves that in my opinion form, together with other similar delinquents against property, the principal contingent of delinquents by acquired habit, because trained or forced to begging and to theft from their tender infancy by their families or by other persons who, especially in large cities, become promoters and professors of crime, they do not know honest toil and are the "bedouins" of the great cities."

§ 97. Precocity and recidivity; — Traits of the Habitual Criminal.

Precocity and recidivity in addition to the anthropological indications are the sociological traits that I have indicated in habitual criminals as in born-criminals but for different reasons.[1] I am reserving the demonstration[2] of how the influence of age on the responsibility of the delinquent is regulated by the positive school quite differently from the classical principles.[3] For the moment I am content to indicate that this display of crime in the youth

[1] *Ferri*, "I nuovi orizzonti," 2d ed. (1884), p. 241; *Filippi*, "Della precocità recidiva nella delinquenza" (Florence, 1884); *Fliche*, "Comment on devient criminel"; "Étude sur la précocité des malfaiteurs" (Paris, 1886). See also *Joly* "La France criminelle" (Paris, 1889), Ch. VI; *Ferriani*, "Minorenni delinquenti" (Milan, 1895); *Morrison*, "Juvenile Offenders" (London, 1896); *Katsch*, "Jugendliches Verbrecherthum" (Forbach, 1896); *Heim*, "Die jüngsten und die ältesten Verbrecher" (Berlin, 1897).

[2] See Chap. III, *post*.

[3] See Chap. III.

of individuals belonging to these two categories is common to all countries. This is consistently shown by the figures, by statistics in a constant progression.[1] Jurists and legislators of the classical school have been forced to recognize and consider it during the last two or three years with an unaccustomed activity. And naturally they have also been compelled to seek scientific criteria and practical measures from the positive school in order to most quickly combat the evil. These measures look especially to the prevention of contact between young delinquents and hardened criminals, — a matter which is of vast importance and which positivist writers have so vainly proven. Statistics show a greater number of precocious criminals in the criminal forms where the congenital tendency prevails (assassination and homicide, violation, arson, armed robbery, qualified thefts) or where there is acquired habit (simple thefts, begging, vagabondage). For the latter group the measures adopted will show all the efficacy which it is possible for them to have with a penal and penitentiary organization still impregnated with traditionalism, in the midst of a social organization wherein are continued the economic and moral conditions that make for habitual delinquency. Side by side with the specific mark of precocity in born-criminals and in habitual criminals, another mark is found; recidivity. "The great number of recidivists, tried annually, proves that thieves practice their industry as a regular profession. Certainly the thief who has tasted prison life will return. The boasted model prison where he is guarded, clothed, fed, and warmed at the expense of the State is so far from reforming him that, scarcely liberated, he returns to his trade. The police arrest him and turn him over to the law. After a shorter or longer time the law turns him over to society, from which the police take him again and so on."[2] "There are very few cases where a man, woman, or child having once become a thief ceases to be such. The exceptions are so rare that they do not deserve citation. Whatever be the reasons, the fact is that a thief is seldom reformed, I was about to say never."[3] "When we succeed in changing an old thief into an honest workman we shall also be able to change an old fox into a

[1] See *Bosco*, "La delinquenza in varii stati d'Europa," which is the latest and most complete study of comparative criminal statistics, in the B. I. I. S., vol. VIII (Rome, 1903).

[2] "The London Police," in the "Quarterly Review" (1871).

[3] *Wakefield*, Director of Newgate Prison, cited by *Girardin*, "Du droit de punir" (Paris, 1871).

domestic dog." [1] To these observations of practical men, and those which I have cited earlier, must be added the distinction we have made between the incorrigibles by birth and those who become such through the coöperation of the social or prison environment. Recidivity among the former is unfortunately unavoidable. Among the latter it can be prevented to a great degree by ameliorations in city and prison. In any event, statistics give striking data on habitual recidivity.

In the work of Yvernés [2] we find in the total of recidivists:

Recidivist per 100	England (Convicts) 1871	Switzerland (Thefts) 1871	France (Accused and arraigned) 1826–1874	Italy (Assizes and tribunals) 1870
Once	38	54	45	60
Twice	18	28	20	30
Thrice	44	18	35	10

In the prison statistics of Prussia, reported by Starke,[3] we find in the total of recidivists, the following percentage for the years 1877–1878, 1881–1882:

Recidivists	
Times	Percentage
1	17.2
2	16.4
3	15.8
4	12.7
5	9.8
6 or more	28.1

At the Penitentiary Congress of Stockholm it was shown that in Scotland 1.6 per cent. of the convicts were recidivists more than twenty times, and 0.3 per cent. more than fifty times; and among women, well known to be more obstinate in recidivity, 15.4 per cent. were recidivists more than twenty times and 5.8 per cent.

[1] *Thomson*, "The Psychology of Criminals," p. 27.
[2] *Yvernés*, "La récidive en Europe" (Paris, 1874).
[3] *Starke*, "Verbrechen und Verbrecher in Preussen," p. 229.

more than sixty times.[1] For the Scotch prisons during ten years the following proportions[2] of the total number of convicts are given:

Recidivists	
Times	Percentage
1	15.7
2 to 3	12.9
4 to 5	5.9
6 to 10	5.6
10 to 20	4.6
20 to 50	3.5
more than 50	1.2
Total	49.4

At the Congress of Social Sciences, held at Liverpool in 1876, Chaplain Nugent said that in 1874 more than 4,107 women were recidivists four or more times "and that a great number of them had been declared incorrigible, having been in prison twenty, thirty, forty, or fifty times. One of them had been in prison more than 130 times."[3]

From my study of 346 convicts at Pesaro and 353 prisoners at Castelfranco, I have compiled the following data:

Recidivists	Convicts	
	at Pesaro	at Castelfranco
Times	Percentage	Percentage
1	81.2	26.0
2	12.5	16.5
3	3.1	14.6
4	3.1	10.8
5	0.8	6.6
6	0.8	5.2
7	1.6	7.1
8	1.6	2.8
9	1.6	2.8
10	1.6	2.3
11	1.6	0.9
12	1.6	0.5
13	1.6	0.9
14	1.6	1.4
15	1.6	0.9
20	1.6	0.5
Total of recidivists	128	212

[1] C. R. C. (Stockholm, 1879), II, 142.

[2] *Oettingen*, "Die Moralstatistik," 2d ed. (Erlangen, 1874), p. 448.

[3] *Nugent*, "Rapporto al congreso di Liverpool," in R. C., VII, p. 42.

Although these figures are more exact than those of general statistics because they are the result of individual researches, they still fall short of the truth. In any event, they throw light on chronic recidivity which is naturally less for the delicts punished with long terms (because of the imprisonment itself). They show it to be a significant symptom of both individual and social pathology in the two classes of born delinquents and delinquents by acquired habit.

§ 98. Two Objections to Precocity as a Mark of the Categories of Born and Habitual Criminals.

Lombroso [1] has made two objections in connection with these two characteristics which I have attributed to born delinquents and delinquents by acquired habit, and reached the conclusion that the absence of precocity and of recidivity is not peculiar to occasional (chance) delinquents. The first objection to my figures rests on the ground that I "should have given not only the most but also the less serious congenital forms, adding the delinquents by acquired habit to the born delinquents. Now, in infancy the acquisition of habit cannot be of long standing; and in any event, if one wished to adhere strictly to the statistical formulae of recidivity and precocity, very slight delicts such as pocket-picking, and begging would have to be reckoned among those of the born-criminals." [2] The second is that the study of Marro on the different kinds of offenders, "when well studied, grouped, and compared from the standpoint of recidivity and precocity immediately bring out the fact that the most trivial delicts (idleness, petty assaults, pocket-picking, and theft) furnish the maximum of recidivity and precocity, while vice versa the maximum of great crimes (murder, swindling, rape) coincides with the minimum of recidivists and precocity." [3] These objections by Lombroso are based solely upon one mistake into which I also fell when I began my anthropological studies on the convicts at Pesaro and on the prisoners at Castelfranco. In the beginning I had considered the galley convicts at Pesaro as born-criminals and the prisoners at Castelfranco as occasional delinquents, taking the gravity of the crime as the test of congenital or occasional delinquency, and, hence, considering as born-criminals those who had been sentenced for the gravest crimes (murder, manslaughter, or rape) and as occa-

[1] "L'uomo delinquente," 5th ed., vol. II, p. 487. [2] *Ibid.*, p. 487.
[3] *Ibid.*, p. 489.

sional offenders those who had been convicted of lesser offenses (blows, pocket-picking, theft, or vagabondage). An observation by Regalia[1] after my studies were communicated to him brought the error to my attention and showed that the gravity of the offense is not the exclusive and complete criterion of the different classes of delinquents. In fact, as Garofalo also observes, if as a general rule those who commit the most odious and savage crimes, particularly when they are precocious offenders, are born-criminals, it does not on that account follow that the authors of trivial offenses are only occasional criminals. Thus theft, which is so frequent, may be committed either by occasional delinquents (who remain such or become habitual according to the conditions of environment) or by true born-criminals. Hence, the objection advanced by Lombroso, that precocity is observed more often in slight than in serious offenses (as I myself have observed) is not equivalent to saying that precocity is observed more frequently among occasional than among born-criminals. Many individuals begin a life of theft and vagabondage early simply because they are born thieves or vagabonds (neurasthenic) or else because their parents force them to it and they then become delinquents by acquired habit. Nor is it true to say, as Lombroso says, that in infancy the acquisition of the habit cannot be of long standing; since every one knows that on the contrary, abandoned children are forced to theft and begging when mere babies and that some individuals count their convictions by the dozen before they have reached even their twentieth year.

§ 99. Objection to Recidivity as a Mark of the Categories of Born and Habitual Criminals.

As to recidivity, of which the causes are in part the same and in part different from those of precocity, Lombroso admitted what I maintained, that the gravest crimes, involving longer penalties, must necessarily show lesser recidivity. But it is one thing to compare the precocity and recidivity of different kinds of crimes among themselves, for example, observing that thieves are more precocious than murderers, and quite another to say as I have said, that aside from those guilty of petty assaults (which are frequently among minors homicide in the germ), the precocity is most frequently observed in the crime of a congenital tendency (murder, rape and robbery) or of habit (thefts, begging, vaga-

[1] A. P. (1881), p. 475.

bondage). That thieves may be a little more or less precocious than murderers does not contradict the fact that of the two hundred and one crimes of the Penal Code only those which I have considered peculiar to congenital delinquency are more frequently committed by minors. This confirms the assertion that the crimes generally committed by occasional delinquents [1] are not committed at a precocious age and do not supply many recidivists, quite the reverse from what is seen in the forms of natural delicts, which are generally committed by born-criminals and habitual criminals.

§ 100. The Criminal through Passion Category.

In addition to the categories of which we have just spoken there remain the last two: criminals through passion and criminals by occasion (chance criminals). Criminals through excess of passion ("delinquenti per impeto di passione"), who form a more distinct variety of occasional criminals, show certain characteristics which easily distinguish them. According to Lombroso,[2] who even in his second edition supplementing Despine [3] and Bittenger,[4] gave a really complete list, we are able to say first of all that these criminals who show especially the type of "irresistible impulse" [5] commit crimes against the person and are quite rare. Thus, of seventy-one criminals through passion studied by Lombroso,[6] sixty-nine were guilty of either homicide or assault; six had been convicted of robbery; three of arson and one of rape. As to their number, Lombroso, like Bittinger and Guillaume,[7] asserted that criminals through passion number five per cent. of the total. This figure is certainly exaggerated. In the first place,

[1] Wounds and voluntary blows; resistance, insult, violence against public officers; injury to immoveables; defamations and insults; arbitrary exercise of rights; refusal of service legally due; delicts of the press; embezzlement, bribery, embracery, abuse of authority by public officials; false witness; violation of domicile; slander; attempt at personal liberty; exposition, substitution, etc. of infants; bankruptcy; duel; abortion; adultery; involuntary homicide; involuntary woundings; illegal practice of medicine and pharmacy; rural delicts, etc.

[2] "L'uomo delinquente," 5th ed., II, pp. 204 *et seq.*

[3] *Despine*, "Psychologie naturelle," I, 278, II, 215 *et seq.*

[4] *Bittinger*, "Crimes of Passion" (London, 1872).

[5] This term expresses inexactly certain real facts and the term has been singularly abused, but is it proper to entirely banish it from criminal law as the new code has done? See also *Ferri*, "L'article 46 codice penale nelle corti d'assise," in the volume "Difese penale e studi di giurisprudenza" (Turin, 1899), p. 380.

[6] *Lombroso*, "L'uomo delinquente," 5th ed., II, p. 221.

[7] *Guillaume*, "Rapporto al congresso penitenziario di Londra," in *Beltrani*, "Stato attuale della riforma penitenzionaria" (Rome, 1874), p. 321.

Guillaume says that crimes committed through passion furnish five per cent. not of convicts in general but of persons convicted through correctional channels. Bittinger makes a general comparison between the crimes through passion and those committed on reflection, which is seemingly very different from Lombroso's comparison of delinquents through passion with habitual delinquents. In fact, we know that real delinquents through an access of passion are for the most part homicidal. When we observe that the total number of murders, including manslaughter, in Italy is scarcely four per cent. of the whole number of convicts of every kind, and in France 0.3 per cent., we see clearly that delinquents through passion cannot constitute five per cent. of the total. In the type which is peculiar to them, they scarcely furnish five per cent. of the sanguinary crime. In fact, this correction was adopted by Lombroso in his fifth edition.[1] These are the individuals whose lives have previously been blameless — men of a sanguine or nervous temperament with exaggerated sensibility, quite the reverse of the born and habitual criminals. They are sometimes of a temperament closely related to that of the insane or epileptic, of which their criminal rage may be only a disguised manifestation. Most often (especially in the case of women) they commit the crime in their youth under the impulse of uncontrolled passion, like anger, jealousy, or shame. Their emotion is violent before, during, and after the crime, which is not committed secretly or stealthily but openly and often by ill-chosen means, the first which come to hand. There are sometimes, however, criminals through passion who premeditate and cunningly execute a crime either because of a less impulsive temperament or, in the cases of endemic crime, under the influence of prejudices and public opinion. That is why in criminal psychology premeditation has no absolute value in distinguishing the born-criminal from the criminal through passion; for premeditation depends more upon individual temperament than upon anything else, and is found equally in crimes committed by all the anthropological types.[2]

[1] *Lombroso*, "L'uomo delinquente," 5th ed., pp. 204 *et seq.*

[2] *Ferri*, "Provocazione e premeditazione," in the volume "Difese penale e studi di giurisprudenza," p. 436. In that monograph, and in the second edition of this book (1884), I established the distinction between social and anti-social passions, both as a positive criterion of responsibility as we shall see in Chap. III, and as the psychological characteristic of the criminal through passion. Lombroso and I have always spoken of the criminal moved by a social passion (love, honor, etc.) — a point on which *Puglia* insists, "Intorno ai delinquenti per passione" in the Riv. carcer. (May, 1897), calling them "delinquents by irresistible moral impul-

Among the other characteristics peculiar to criminals through passion is the fact that the determinant psychological cause is proportionate to the crime and that the crime (I must add) is its own object and not a means to the commission of other crimes. They do not hesitate to avow their misdeed, and their excessive repentance may lead to suicide. In fact many commit suicide immediately or a short time after the criminal attack. If they are convicted (which rarely happens) they continue to show repentance and improve, or rather they are not corrupted in prison, thus affording a small number of obvious cases from which some observers believe themselves warranted in drawing the conclusion that the improvement of offenders is constant. On the contrary, however, improvement is unknown among born and habitual criminals. Criminals through passion show few or none of the characteristics, such as I have given in studying the physiognomies of homicides. These are the distinctions of the criminal by access of passion. They are, however, less marked in countries where certain crimes against the person are endemic, such as homicide for revenge or on a point of honor in Corsica and Sardinia, or the political homicides of a few years ago in Russia and Ireland.

§ 101. The Occasional Criminal Category.

There is finally the category of occasional criminals ("delinquenti d'occasione"). These chance criminals have not received from nature an active tendency towards crime but have fallen into it, goaded by the temptation incident to their personal condition or physical and social environment and who do not repeat their offense if these temptations are removed. They commit crimes, therefore, which do not belong to natural delinquency, and even in the commission of crimes against the person or property they act under individual and social conditions entirely different from those in which such crimes are committed by born criminals and habitual delinquents. Assuredly, even in the chance criminal, a part of the causes which determine the crime belong to the anthropological order; since, without the particular dispositions of the individual, the exterior impulsions would be insufficient. For example, in a period of hard times the whole population does not

sion." See *Puglia*, "La distinzione dei delinquenti di Lombroso e il diritto repressivo," in the "Anomalo" (March, 1897). See also *Bonanno*, "Il delinquente per passione" (Turin 1896), p. 37; *Zuccarelli*, "I passionati del bene," S. C. (15 August, 1894).

devote itself to theft. One man prefers the sufferings of honest and undeserved poverty, another goes so far as to beg; and even among those who descend to crime, some are content with larceny, while others commit burglary or highway robbery. But since there are no absolute distinctions in nature, the fundamental difference between the chance criminal and the born-criminal consists always in this fact, that in the latter the external stimulus is secondary when compared to the internal criminal tendency which in itself has a centrifugal force impelling the individual to crime; while in the former is found rather a feebleness of resistance to external stimulus, which consequently becomes the principal determinant force. The incident which provokes the crime in the case of the born-criminal is simply the point of application of a preëxisting instinct, so to speak. It is less an occasion than a pretext. With the occasional criminal it is, on the contrary, the real stimulus which vitalizes the latent criminal spark. In the born-criminal it is a fact which determines the discharge of a persistent distinctive force; in the chance criminal it is a fact which simultaneously causes the growth and explosion of a criminal instinct. For this reason Lombroso [1] calls occasional delinquents, criminaloids ("criminaloidi") to indicate that their organic and psychic constitution presents abnormality, in lesser degree than is found in true criminals or born-criminals. The relation expressed is analogous to those shown by the words metal and metaloid or epileptic and epileptoid. Such a definition, however, destroys the criticisms that Lombroso himself made of the idea of the occasional criminal category when he said, as did Benedikt at the Congress of Rome and as Sergi [2] has later repeated, that "all criminals are born-criminals," and hence the true occasional criminal or the normal man, urged to crime by occasion alone, does not exist. For my part, in accord with Garofalo, even in the second edition of this work (1884), I have never expressed any such conception of the occasional criminal. But on the contrary I have always said, as Lombroso himself admits a little farther on, quoting my words,[3] that there is only a difference of degree and modality between the born and the occasional criminal, — a thing, moreover, which is true of all the categories of delinquents. Of

[1] "L'uomo delinquente," 5th ed., II, p. 507.

[2] *Lombroso*, "L'uomo delinquente," 5th ed., II, p. 204; II, p. 488; A. C. A. C. (Rome, 1887), p. 140; *Sergi*, "Le degenerazioni umane," p. 103.

[3] "L'uomo delinquente," 5th ed., vol. II, p. 537.

the two conditions which psychologically determine crime — moral insensibility and lack of foresight ("improvidenza") — the crime of occasion is traceable to the latter, while congenital and habitual delinquency is principally traceable to the former. In the born-criminal it is lack of social feeling which prevents him from recoiling before crime. In the occasional criminal this social sense exists or is much less obtuse, and not being seconded by a sufficiently lively appreciation of the consequences, it yields to the exterior impulsion, without which it was strong enough and would have remained strong enough to hold the individual in the straight path. In every man, no matter how pure and honest he may be, the fugitive thought of a dishonest or criminal act occurs on certain seductive occasions. But in the honest man, because of his organic and moral fiber, this tempting image which immediately awakens a vivid idea of the possible consequences is overcome by his strong psychic organization. With a man of less strength and less foresight it overpowers the resistence of a weak moral sense and finally conquers, because, as Victor Hugo says, "in the face of duty, doubt is defeat."[1] A criminal by passion is a man with sufficient strength to resist ordinary and mild temptations but without sufficient force to resist the psychological tempest which sometimes becomes so violent that no man, be he ever so strong, could resist it. The forms of occasional delinquency that we have enumerated contain the reason for their origin, in the accidental character which distinguishes them. Following Lombroso,[2] the general stimulants of age, sexuality, poverty, influence of the weather, of the moral environment, of alcoholism, of personal circumstances, and of imitation (of which Tarde has undoubtedly exaggerated the casual importance in social facts but showing fully the part which they play in human activity)[3] must be taken

[1] As an example, I recall the case of the alienist, Morel, who relates it himself. Crossing a bridge one day in Paris, he saw a workman who was leaning on the parapet and gazing over it; he felt a homicidal impulse traverse his brain like a flash of lightning but he took to his heels in order not to yield to the temptation to throw the man into the water. The case of a nurse of Von Humboldt is related by Esquirol, who seeing and touching the rosy flesh of a new born babe was seized with the temptation to kill it and ran to warn other persons in order to avoid a tragedy. We recall also the literary man of whom *Brière de Boismont* speaks in "Suicide" (1865), p. 335, who "in looking at a painting at the Exposition was seized with such a desire to destroy it that he had scarcely time to withdraw in the greatest haste." For other instances see *Ferri*, "L'Omicidio, pp. 530, 531.

[2] *Lombroso*, "Delinquenti d'occasione," A. P., II, 3; "Uomo delinquente," 5th ed., p. 482 *et seq.*

[3] *Tarde*, "La psychologie en économie politique," R. P. (1881), p. 401; "Des

into consideration. Thus Lombroso distinguishes two varieties of occasional criminals: on the one hand, the pseudo-criminals, *i. e.*, normal men who commit involuntary crimes, political crimes, or misdeeds which imply no perversity and involve no damage to society, although the law considers them criminal; on the other hand, the criminaloids, who commit ordinary crimes but who are differentiated from ordinary criminals for the reasons above given.

§ 102. Difference Between Categories One of Degree.

Apropos of these anthropological categories, we would make a last general observation — one which meets certain objections frequently made by those syllogistic critics of criminal anthropology who have never personally observed nor studied criminals. In the first place, the differences between these five classes of criminals are only differences of degree and modality, both in their organic and psychic traits and in the concurrence of the physical and social environment. There is no essential difference between the groups of any natural classification. This is not only true of mineralogy, botany, zoölogy, or general anthropology, but of criminal anthropology as well. It does not take away either experimental solidity or practical importance from the natural classification. The same is true of the classifications of criminal anthropology. In natural history we pass by degrees and shades from the inorganic world to the organic (since even in minerals there is a minimum degree and a first form of life as is shown by the laws of crystallization), and biology is only an ulterior evolution of physics and chemistry.[1] In the organic world we pass by degrees and shades from proteids to vegetation, then to animals and their species which become more diversified as they multiply. So, also, in criminal anthropology, we pass gradually from the insane criminal to the born-criminal passing over the morally insane and epileptic delinquents. From the born-criminal we pass to the occasional criminal meeting

traits communs de la nature et de l'histoire," *id.* (1882), pp. 270 *et seq.*; "L'archéologie et la statistique," *id.* (1889), pp. 363 and 492, works collected and supplemented in the volume "Les lois de l'imitation," 2d ed. (Paris, 1895). See also *Morici*, "L'imitazione nella vita sociale e nella affezione nervose" (Palermo, 1888).

For criticism see *Ferri*, "La teoria sociologica del Tarde," S. P. (September, 1895).

[1] *Pilo*, "La vita nei cristalli — Prime Linee di una futura biologia minerale," R. F. S. (December, 1885); *Dal Pozzo di Mombello*, "L'evoluzione dall' inorganico all' organico," *id.* (December, 1886); *Morselli*, "Lezioni di antropologia generale" (Turin, 1889–1899).

on the road the criminal by acquired habit who begins as an occasional wrongdoer and finally ends, through acquired degeneracy, in showing the organic characteristics and especially the psychic traits of the born-criminal. Finally, we pass from the occasional criminal to the criminal by passion who is of a more distinct variety, since, with his neurotic, hysterical, or epileptoid or mattoid temperament, the criminal by passion often resembles or is partly merged in the insane criminal.[1]

§ 103. Application of Class Division of Criminals.

Thus in actual everyday life, as in the study of every living being, intermediate types are found — and this is why the idea of species and variety is altogether relative. In examining criminals, we find, and in great number, types intermediate between the anthropological categories, it being always understood that the complete and distinct types are the least common. Thus it has rarely happened that the Courts of Justice have had to deal with an accused person who completely and clearly showed the characteristics of any anthropological type. The law and the judge require the medico-legal expert to describe the accused in monosyllabic answers of yes and no when interrogated as to his sanity, believing that all living nature can be bound up in juridical syllogisms. Very often, however, all that the expert can answer is that the accused is in a state between sanity and insanity or between insanity and congenital delinquency. Yet, this does not imply the impossibility of applying this classification in practice to penal legislation. Such an application is the task of criminal sociology.

A delinquent is already classified with precision when we are able to say that he stands midway between two determined categories. To say the one accused is placed between the insane criminal and the born-criminal, another between the insane criminal and the criminal by passion or between the occasional delinquent and the habitual delinquent, is to fix the anthropological type with as much safety as when a greater number of traits and circumstances of fact place him definitely in one of these anthropological categories. As to the objection that criminal anthropology cannot practically determine to what anthropolo-

[1] For this reason *Bonono*, "Il delinquente per passione," p. 76, rightly distinguishes two varieties of criminals by passion: those who resemble the insane or epileptoid criminal, and those who represent the real type.

logical category the author of a given misdeed belongs (and this is one of the subjects discussed at the Congress of Paris under Garofalo's chairmanship), that can come only from a man who reasons from an abstract and nebulous image of the delinquent, an image which he draws in his own mind, exactly as to the classical criminalists and the codes. A personal examination of a delinquent undertaken with sufficient attainments in anthropology and in criminal psychology always classifies him. This is sometimes easy for the distinct types, for often a few symptomatic details of their attitude before, during, and after the crime, without the necessity of a direct personal examination,[1] will mark the class. Sometimes it is difficult because with intermediate types it is necessary to make a complete diagnostic examination of the organic, psychic, and social traits. In an examination for the anthropological classification of criminals while the organic marks alone suffice in the clear cases, as in certain types of born homicides, still, as a general rule, the most decisive diagnostic value lies in the psychological characteristics. These, however, as I have said in speaking of the criminal type, should never be separated from the organic characteristics, the data furnished by antecedents, nor the actual circumstances of the crime, when classifying a delinquent. This is true even when he is classified as insane. Hence, as Garofalo[2] says, while the classical criminal science knows only two terms: crime and punishment; criminal sociology knows three: crime, the criminal, and the appropriate means of social defense. I might therefore conclude that until now science, law, and although in lesser degree, practical justice have punished the crime in the delinquent, for the future we must judge the delinquent in the crime.

§ 104. Numerical Proportions of the Five Categories of Criminals.

The general lines being thus given for the five categories into which the criminal world is divisible, the question naturally arises: what are their respective numerical proportions? The question

[1] I proved this in my diagnosis of insanity in Caporali (the assailant of Crispi) from characteristic data reported in the papers. The diagnosis (rudimentary paranoia) was confirmed at the trial by the experts for the prosecution and defense. See *Ferri*, "Una diagnosia distanza," in the "Difese penale e studi di giurisprudenza," p. 453.

[2] *Garofalo*, "Lorsqu'un individu a été reconnu coupable, peut-on établir par l'anthropologie criminelle la classe criminelle à laquelle il appartient?" in the "Actes du congrès de Paris" (Lyons, 1890), pp. 73 and 353. See also *Ferri*, "Uno spiritista del diritto penale," A. P., pp. 145 *et seq.*, 150 *et seq.*

is not easily answered, because methodical researches in this direction are wanting and because there is no absolute separation between the different classes of delinquents. Hence one cannot give a sufficiently precise statistical or general answer. Contenting ourselves for the present with an approximation, we may say, first of all, that the categories of criminal insane and criminals through passion are by far the least numerous and give a figure which, in spite of the uncertainty of the data on the subject, we may estimate as fluctuating between five and ten per cent. of the total criminality in general. It naturally varies for the different species of crime. For the rest of the mass of delinquents some data which I have given shows that the two categories of born-criminals and delinquents by acquired habit should furnish about forty to fifty per cent. These figures are, I repeat, only approximate, because they vary with the kinds of crime. For example, among thieves, the proportion of born-criminals is much less than among murderers, robbers, or burglars. It would be still less for a series of individuals convicted of riot, petty assaults, or disorderly conduct. Finally, in this connection, we should remember that among the forms of habitual delinquency taken generally, there may be found some occasional delinquents, especially in homicide and theft, and that the crimes which are ordinarily occasional may also be committed by born or by habitual criminals; thus riot and petty assault; — crimes which show the characteristics, although in lesser degree, of precocity and recidivity.

§ 105. Other Classifications of Criminals.

And now concluding the subject of criminal anthropology, there remains the indication of a fact of great scientific and practical importance. Since I developed this moral classification of criminals in 1880, in the "Archivo di psichiatria," [1] all who have studied criminality as a natural and social phenomenon have recognized the necessity of not only a simple classification like the basic and no longer recent distinction between habitual and occasional delinquents (to which for no known reason the International Union of Penal Law exclusively adheres) but also of one which should at the same time be complex and contain more or less subdivisions, according to the different criteria adopted. Aside from Royce, Guyau, Siciliani, Tallack,

[1] A. P., (1880), I, 474.

Carrau, Garofalo, Fouillée, Espinas, Reinach, Ten Kate and Pavlovski, Soury, Oettingen, Desportes, Du Cane, Zuccarelli, Acollas, Beaussire, Joly, Binswanger, Krohne, Proal, Olrik,[1] and others who have resumed the distinction between habitual and occasional criminals, and aside from the great majority of positivists who have accepted my classification, there are other observers who have proposed different classifications. I shall not restate the long review of these given in my Italian editions, but shall refer to only the principal ones. The authors of the others are Minzloff, Le Bon, Puglia, Tamassia, Porto, Lucas, Liszt, Medem, Saleilles, Föhring, Poletti, Badik, Krauss, Benedikt, Bianchi, Marro, De Bella, Topinard, Joly, Garofalo, Yvernés, Sergi, Foinitzki, Pelman, Bonfigli, Baviera, Salillas, Pellizari, Severi, Rivière, Ziino and Perrier.[2] Lacassagne dis-

[1] *Royce*, "Deterioration and Race Education"(Boston, 1878), pp. 29 *et seq.*; *Guyau*, "La morale anglaise contemporaine" (Paris, 1879), p. 332; *Siciliani*, "Socialismo, Darwinismo e sociologia moderna" (Bologna, 1879); *Tallack*, "La récidive d'habitude en Angleterre," in the B. S. G. P. (December, 1879); *id.*, "Penological and Preventive Principles" (London, 1889), Cap. V. pp. 165 *et seq.*; *Carrau*, "Études sur la théorie de l'évolution" (Paris, 1879), p. 192; *Garofalo*, "Criterio positivo della penalità" (Naples, 1880), p. 287; *Fouillée*, "La science sociale contemporaine" (Paris, 1880), p. 287; *Espinas*, "La philosophie expérimentale en Italie" (Paris, 1880), p. 160; *Reinach*, "Les récidivistes" (Paris, 1881), *passim*; *Ten Kate and Pavloski*, "Sur quelques crânes criminels," R. A. (1881), fasc. I; *Soury*, "Le crime et les criminels," N. R. (February, 1882); *Oettingen*, "Ueber die methodische Erhebung und Beurteilung kriminalstatistischer Daten," Z. G. S. (1881), p. 42; *Desportes*, "Rapport sur la récidive," in the B. S. P. (Paris, 1884), p. 123; *DuCane*, "Punishment and Prevention of Crime" (London, 1884), p. 4; *Zuccarelli*, "I delinquenti"; *Acollas*, "Les délits et les peines" (Paris, 1887), p. 10; *Beaussire*, "Les principes du droit" (Paris, 1888), p. 148; *Joly*, "Le crime," pp. 52, 73; *Binswanger*, "Verbrechen und Wansinn," 61st Congress of German Naturalists (Cologne, September, 1888); *Krohne*, "Lehrbuch der Gefangnisskunde" (Stuttgart, 1880), II, Th., § 1; *Proal*, "Le crime et la peine" (Paris, 1894), p. 445; *Olrik*, "Ueber die Einteilung der Verbrecher," Z. G. S. (1894), XIV, p. 76.

[2] *Minzloff*, "Étude sur la criminalité," P. P. (September, 1880); *LeBon*, "La question des criminels," R. P. (1881), p. 525. *Puglia*, "La psico-fisiologia e l'avvenire della scienza criminale," A. P., II, p. 69; "Il reato d' omicidio" (Milan, 1881), *id.*, p., 39; "Risorgimento ed avvenire della scienza criminale" (Palermo, 1886), p. 38. *Tamassia*, "Gli ultimi studi sulla criminalità," R. S. F. (1881), II part, p. 198; "Aspirazioni della medicina legale moderna" (Padua, 1883), p. 25; *Porto*, "La scuola criminale positiva e il progetto di nuovo codice" (Padua, 1884) p. 8; *Lucas*, "A locura perante a lei penal" (Lisbon, 1887); *Liszt*, "Der Zweckgedanke im Strafrecht," Z. G. S., III, 1, p. 36 (Berlin, 1883), and "Aperçu des applications de l'anthropologie criminelle" in the Actes du Congrès (Brussels 1893), p. 95; "Die psychologischen Grundlagen der Kriminalpolitik," Z. G. S. (1896), p. 477; *Medem*, "Das Problem der Strafzumessung im Gerichtssaal" (1888), n. 3–4; *Saleilles*, "The Individualization of Punishment," Little, Brown & Co. (Boston, 1911); *Föhring*, "Uno sguardo alle instituzioni di Patronato dei liberati dal carcere," in the "Atti del congresso internazional di beneficenza a Milano

tinguishes:[1] (a) the incorrigible, criminals by feeling or instinct, subdivided into two groups: criminals by hereditary tendency and criminals through the habit of vice; (b) the criminals by action who are such through occasion or possession; (c) the criminals of thought who are the criminal insane. Arboux distinguishes also[2] evildoers by instinct who have no remorse — habitual criminals — occasional criminals. This threefold classification is repeated by Starke who is concerned almost exclusively with recidivity, and by Moreau, Garraud, and Virgilio.[3] Maudsley, who distinguished accidental, habitual and congenital criminals in "The Pathology of the Mind," has recently added to these classes that of the criminal

nel 1880" (Milan, 1882), p. 432; *Poletti*, "Il sentimento nella scienza del diritto penale" (Udine, 1882), pp. 52, 53; *Badik*, "Einteilung der Verbrecher in vier Typen," in the "Archiv für Pathologie anatomie und physiologie" (August 1884), and R. C. (1885), p. 110; *Krauss*, "Die Psychologie des Verbrechens" (Tübingen, 1884), pp. 227 *et seq.*; *Benedikt*, A. C. A. C. (Rome, 1887), p. 141; "Des rapports entre la folie et la criminalité" (Vienna, 1885); *Pisa*, "Benedikt e la nuova scuola di diritto penale," in the "Monitore dei tribuni" (Milan, 30 October, 1896); *Bianchi*, A. C. A. C. (Rome, 1887), p. 137; *Marro*, A. C. A. C. (Rome, 1887), pp. 12 and 136; "I caratteri dei delinquenti" (Turin, 1887), p. 434, *De Bella*, "Prolegomeni di filosofia elementare" (Turin, 1887), p. 159; "Anomalo" (Naples, April, 1889); *Topinard*, "L'anthropologie criminelle," R. A. (November, 1887), p. 687; *Joly*, "Le crime," p. 52; *D'Haussonville*, "Rapport dans l'Enquête parlementaire sur les établissements pénitentiaires," VI, 141, and 338; *Motet*, Testimony in the same Enquête, I, 195; *Garofalo*, "La criminologie," pp. 89, 90, 381 *et seq.*; *Idem*, A. C. A. C. (Rome, 1889), p. 139; "Rapport au congrès A. C. de Paris," in the A. C. A. C. (Lyons, 1894), p. 73; "Sur la classification des criminels," A. C. A. C. de Genève (1897), p. 145; *Yvernès*, "Comptes générales de la justice criminelle de 1838 à 1887" (Paris, 1889), Introd.; *Sergi*, "Le degenerazioni umane" (Milan, 1888), p. 105; *Foinitzki*, "La scienza delle pene e la teoria della detenzione" (in Russian, St. Petersburg, 1889), and bibliography in the A. A. C. (May, 1889), p. 334; *Pelman*, "Zurechnungsfähigkeit und Criminalität," Report to the Congress of Alienists at Weimar in "Neurologisches Centralblatt" (October, 1891); *Bonfigli*, "Storia naturale del delitto" (Milan, 1893), p. 37; *Baviera*, "La riforma positiva delle scienze criminali" (Palermo, 1893), p. 44; *Salillas*, "El delincuente español" (Madrid, 1896), and *De Quiros*, "Las nuevas teorias de la criminalidad" (Madrid, 1898), p. 94; *Pellizari*, "Il delitto e la scienza moderna" (Trévise, 1896), p. 339; *Severi*, "L'uomo criminale," M. M. L. (Milan, 1896), 2d ed., III, p. 1611; *Rivière*, "Du rôle de l'individualisation dans l'exécution des peines," in the "Rev. pénit." (July, 1897), p. 1045; *Ziino*, "Shakespeare e la scienza moderna" (Messina, 1897), p. 82; *Perrier*, "Les criminels," A. A. C. (September, 1898), p. 524.

[1] *Lacassagne*, "Marche de la criminalité," etc. in "la Rev. scientif." (Paris, May 28, 1881), p. 683.

[2] *Arboux*, "Les prisons de Paris" (Paris 1881), *passim*.

[3] *Starke*, "Verbrechen und Verbrecher in Preussen," p. 219; *Moreau*, "Souvenirs de la petite et grande Roquette," II, p. 439, 441; and for thieves, "Le monde des prisons," p. 1; *Garraud*, "Droit pénal et sociologie criminelle," A. A. C. (1886), p. 17; *Virgilio*, "Passanante e la natura morbosa del delitto," pp. 41, 45.

insane, so that his classification is about the same as mine with the sole difference that I have classified criminals through passion separately as a distinct variety of accidental criminals.[1] Corre also gives a classification which corresponds to the one that I have proposed. He distinguishes insane criminals (whom he calls pseudo-criminals), accidental criminals, and criminals by status or profession, among whom he includes born and habitual criminals; and adds a category of latent criminals or of pseudo-honest folk.[2]

§ 106. Colajanni and Lombroso Accept the Five Classes of Delinquents.

After arguing against all of the data of criminal anthropology Colajanni finally accepts, as I said he would, the classification that I have proposed and only adds to it the category of political criminals, which is without logical or experimental consistency.[3] If in obedience to political considerations which should never appear in science, he insists on having us know that political criminals, at least those who are really honest and normal men misguided by their political ideals, should not be confused with ordinary criminals, then there is a logical contradiction in making them a class of "criminals," since from our standpoint they are not criminals but pseudo-criminals. If he pretends to put in this category all who commit offenses of a political character, he is not in harmony with experience, since political delicts may be committed and are committed every day, not only by men really misled by political passion (pseudo-criminal), but also by insane, born, occasional, and habitual criminals, who, either by social contagion or through personal circumstances, give their criminal tendencies the form of political crime. In our opinion, therefore, political criminals either are not criminals at all or else belong to one of the five categories of the general classification.[4] Lombroso

[1] *Maudsley*, "The Pathology of the Mind" (London, 1878); "Remarks on Crime and Criminals," J. M. S. (July, 1888), and R. C. (1888), p. 81.

[2] *Corre*, "Les criminels," pp. 329 *et seq.*

[3] *Colojanni*, "Sociologia criminale," I, 352 *et seq.*; *Sernicoli* also, "L'anarchia e gli anarchici" (Milan, 1889), has made pretense of fixing a type of political criminal "an intermediate state between sanity and madness." But he has been refuted by *Laschi*, S. P. (30 September, 1894), p. 894.

[4] See *Laschi* and *Lombroso*, "Du délit politique," A. A. C. (Rome, 1887), pp. 37 and 379; "Il delitto politico" (Turin, 1890), p. 1, Cap. VIII and XI; *Régis*, "Les régicides" (Lyon, 1890); *Hamon*, "Les hommes et les théories de l'anarchie" (Paris, 1893); "La psychologie de l'anarchiste-socialiste" (Paris, 1895); *Gil Maestre*, "Socialismo y anarquismo en relacion con la criminalidad," in the "Revista generala de legislatione y jurisprudenzia" (December, 1894 and January, 1895); *Dallemage*, "Anarchie et responsabilité" (Brussels, 1895), and *Van Hamel*,

in the second volume of "Uomo delinquente" also follows my classification. After speaking in his first volume of the born-criminal (identified with the morally insane and the epileptic criminal), he gives in his second volume a masterful anthropological description of the criminal through rage or through passion, of the insane criminal (with the alcoholic, hysterical, mattoid varieties) — and of the occasional criminal (with the varieties of pseudo-criminals, criminaloids, criminals by habit, latent criminals, and epileptoids).[1]

§ 107. New Basis for Legal Science.

A few conclusions of fact appear upon a comparative review of the different classifications. The necessity for abandoning the single and abstract criminal type, as well as the necessity of substituting a classification which responds better to the variety of natural facts, is generally recognized. This classification, first begun from the viewpoint of the prisons, was extended by me (completed in 1880) to the proper and real field of criminal sociology where it has since enjoyed full rights of citizenship and where it has exerted the inexorable influence of a positive fact. While some criminologists, who recognize its truth, willingly assent to this division into several categories as useful in penal administration, we maintain on the contrary[2] that this distinction be recognized as one of the supreme norms of legal science, and that social defense should be regulated in matters of quality and degree according to it. In other words, social defense should be based on the fundamental data of criminal sociology.

§ 108. Five Classes a Natural Division.

Among the different classifications proposed there are no essential differences. This fact, while confirming the excellence of the experimental method which insists above all on the study of

"L'anarchisme," A. C. A. C. (Geneva, 1897), pp. 111 and 253; *Lombroso*, "Gli anarchici," 2d ed. (Turin, 1895); *Sernicoli*, "L'anarchia e gli anarchici"; *Laschi*, "L'anarchia, gli anarchici e la Scuola positiva," S. P. (30 September, 1894); *Proal*, "La criminalité politique" (Paris, 1895); *Venturi*, "Regicidi e anarchici" (Catanzaro, 1895); *Ferrero*, "Gli ultimi attentati anarchici e la loro repressione," in the "Riforma sociale," I, p, 11 (1895); *Kennan*, "Les prisonniers politiques en Russie" (Geneva, 1896); *De Veyga*, "Anarquismo y anarquistas, Estudio de anthropologia criminal," in the "Anale del departmento nazionale de higiene" (Buenos-Ayres, September, 1897); *Sernicolli*, "I delinquenti anarchici" (Rome, 1899).

[1] *Lombroso*, "L'uomo delinquente," 5th ed., vol. I and II.

[2] See Chap. III, *post*, and the positive theory of imputability there outlined.

facts and forbids the theoretical opposition of principles usual in "a priori" systems, shows that the substance of the observations made and the inductions drawn actually correspond to natural reality. There is in fact unanimity on the primitive and fundamental separation of occasional criminals from those by instinctive tendency, of those who are capable of betterment from those who are incorrigible. There is unanimity also for the subdivision of each of these great categories into two varieties, thus obtaining the four classes: occasional criminals, criminals by passion, born-criminals, and criminals by mental alienation. There will remain the further category not conceded by all, — the intermediate category which includes those whom I have called criminals by acquired habit. Aside from the unimportant differences of nomenclature, the partial disagreement in classification has its source in the difference in the distinguishing criteria adopted. The classification of Lacassagne, Krauss, Joby, Badik, Marro, and Pelman, at least in their primary denominations, show simply a descriptive criterion, centered on the manifestations of crime in the three principal branches of human life, — sentiment, idea, and act, and only take into account the marks of the descriptive and not the genetic psychology of the criminal; or consult only his organic marks. The same may be said of the classifications of Liszt, Medem and Minzloff which are determined by a curative or defensive criterion such as the efficacy of punishment; of the classification of Föhring with its special point of view of patronage; and finally, of the classification of Starke based on the symptomatic criterion of a single mark which is in truth distinctive but too special, namely, that of recidivity. The criterion which I adopted in making my classification is genetic and casual, that is, it pertains to individual physical and social causes from which the different manifestations of criminal activity are derived. As such, it seemed to me to respond better to the theoretical exigencies and practical needs of criminal sociology. In fact, the majority of the other classifications inspired by this very criterion (those by Puglia, Benedikt, Prins, Maudsley, Carre, Garofalo, Bonfigli, Severi, and Lombroso) either reproduce my classification in its basic distinctions or can be reduced to it and hence correspond to it. My classification receives overpowering confirmation from the fact that it can include every other classification. It is evident that it faithfully represents the constant and common fund of all the principal anthropological categories of criminals both in re-

spect to their natural origin and distinctive marks and the different methods of social defense derived from it.[1] I will make one observation of fact, so to speak, and one of law for those who subscribe to a different classification. The fact: the reason that Puglia, for example, did not accept a separate category for criminals by acquired habit, is that he gave his attention only to attempts against the person, especially to homicide, and we cannot accept, at least in an absolute way, a class of homicides by acquired habit in the sense that they have become such principally through the cooperation of external surroundings. Our classification has the mark of generality valuable for all criminal forms and must naturally vary in adapting itself to a given class of crimes taken separately. The same may be said to those who do not accept the class of criminal insane because they consider that these belong to psychiatry and not to criminal anthropology. The observation of law is this: the true positivist should not improvise classifications in his study, but should deduce them from the direct study of natural facts; in our case from the study of criminals. Now I dispute the right of mere formal logic to declare a class of phenomena non-existent unless its decision is supported by a mass of positive observations. Each category of criminals pictures a reality of fact observed in the prisons. To weaken its existence it must be opposed by other facts, other anthropological observations capable of correcting and completing the previous observations and facts. In reality (and this is the most popular criticism of the opponents of criminal anthropology) it is as easy as it is futile to say that such a type or such a fact does not exist. It is easy to deny. Proof by experience is more difficult but more positive, hence, all the syllogistic objections offered to criminal anthropology have not prevented its development and progress. In conclusion, let us bear in mind that as a general rule it is better to abound in distinctions rather than to confound facts with different determining causes in a single series. To give another illustration, it has been recognized in biological research that the

[1] The bio-social classification of criminals proposed by me is now accepted and followed almost unanimously by anthropologists and criminal sociologists, as may be seen among the more recent: *Kurella*, "Naturgeschichte des Verbrechers," p. 262; *Viv eiros di Castro*, "A nova escola penal" (Rio de Janeiro, 1894), p. 127; *Paolucci*, "Basi nove del diritto di punire" (Frosinone, 1896), p. 145; *Bonanno*, "Il delinquente per passione"; *Motta*, "Classificação dos criminosos" (S. Paulo, 1897), p. 18; *Ottolenghi and Rossi*, "Duecento criminali," pp. 212–213; *Angiolella* "Manuale di antropologia criminale," p. 273; *Allongi*, "Manuale di polizia scientifica" (Milan, 1899), p. 260.

method of restricted series is much superior to that of broad series. If social therapy, like individual therapy, seeks the indication of remedies from a minute and complete knowledge of causes, it is evident that by distinguishing a sub-class in the great category of incorrigible or occasional criminals, we aid the study of remedies which may be applicable to these morbid manifestations of social life. Of this, we shall become even more convinced in considering the social causes of criminality with the aid of statistics.

PART II

DATA OF CRIMINAL STATISTICS

CHAPTER I

METHODS OF COLLECTING CRIMINAL STATISTICS[1]

Moral and criminal statistics. History and statistics. Natural and legal criminality.

§ 109. Importance of Criminal Statistics.

In social phenomena, experiment, easy in physical and biological phenomena, is difficult and often impossible, and observation is the most suitable means of scientific research. Statistics are among the most useful methods of observation. Hence, it is natural that the criminal sociologist, after his study of the individual in the natural genesis of crime, should have recourse to criminal statistics. This, says Krohne, is the first condition of success in the battle with the forces of crime and answers the same function as reconnoitering in war.[2] For, if, as Quételet said, statistics are the "nosce te ipsum" applied to society, or if speaking less accurately with Féré,[3] statistics are "the conscience of the social organism," they are the source of the modern conception of the intimate connection of crime, in a part of its genesis and in its special forms, with the conditions of social life. Criminal statistics are for criminal sociology what histology is for biology. They show, in the individual elements which compose the collective organism, the basic reasons of crime viewed as a social phenomenon not only in the field of scientific research and induction, but also in that of practical legislative application. Lord Brougham at the statistical Congress at London, in 1860, said, "Criminal statistics are to the legislator what charts, the compass, and the

[1] For the history of these researches, see: *Oettingen*, "Geschichtliche Entwickelung der Moralstatistick," pp. 20 *et seq.*, of his "Moralstatistick"; *Fuld*, "Die Entwickelung der Moralstatistick" (Berlin, 1884).

[2] *Krohne*, "Der gegenwärtige Stande der Gefangnisswissenschaft," Z. G. S. (1881), I, 75.

[3] *Féré*, "Dégénérescence et criminalité" (Paris, Alcan, 1888), p. 123.

lead are to the navigator." [1] This they are or this they should be, and yet in compiling the new Italian Penal Code, the preceding Italian codes (the Tuscan, for example) and the more modern foreign codes were copied and retouched in a more or less happy fashion, but the legislators, although wavering between ancient and modern ideas, made not the slightest pretense of considering the most obvious results of criminal statistics in our country.[2]

§ 110. Method of Collecting and Studying Criminal Statistics.

In the case of statistical data as in the case of criminal anthropology, it is well to present some preliminary observations on the study of such data, before drawing lines and general conclusions. As to the method and technical procedure of abstracting and weighing the data of criminal statistics, Oettingen has given some ideas which deserve to be recorded, since this subject has never been developed, either before or after him, except from a more strictly technical viewpoint, which less concerns us. The author of "Moralstatistick" begins with the declaration: "The abstracts of criminal statistics, thus far attempted, have been made at hazard, so that a student who wishes to make a special research is discouraged by finding no definite point of departure. The tendency to deduce from criminal statistics conclusions of public morality, and particularly of the corruption of national morals, is more general than one would believe; but it is not scientifically accurate because the mere figures of delinquency do not give exactly the direct measure of the immorality of a people although they always furnish an important symptom of the morbid state of society. . . . It is also evident that in the social and moral comparison of different nations the figures cannot be employed without correction. It is not solely a question of penal legislation. That differs in the various countries and changes even in the same State so that even

[1] *Romagnosi*, "Osservazioni statistiche sul resoconto della giustizia criminale in Francia pel 1827," in the "Annali Universali di statistica" (1829), XIX, I; *Bentham*, "Principles of Legislation, I, cap. 9–10; *Abegg*, "Bedeutung der Criminalstatistick für die Wissenschaft, Anwendung und Gesetzgebung im Gebiete des Strafrechts," in the "Zeitschrift des Königlichen Preuss. Statistik Bureaus" (1866), p. 115; *Fuld*, "Einfluss der Kriminalstatistick auf Strafgesetzgebung," etc. in the "Archiv für Strafrecht" (1885), p. 220; *Mischler*, "Die Criminalstatistick als Erkenntnissquelle," in the "Handbuch des Gefängnisswesens of Holtzendorff" (Hamburg, 1888), I, 56.

[2] *Ferri*, "Discorsi parlamentari sul nuovo codice penale" (Naples, 1889), pp. 30 *et seq.*, and "Intorno al nuovo codice penale," in the "Difese penali e studi di giurisprudenza."

in the same country the figures of crime cannot be compared with those of the other legislative periods. This is particularly true of France, of which country the criminal statistics covering more than a half-century have recently (1880-1881) been voluminously treated by Enrico Ferri. Yet it seems to me that Ferri himself falls into the error of drawing too precipitate conclusions from figures and of finding in them (whatever account he may take of legislative periods) a criterion of the increase or decrease of criminal tendencies in the life of the people and in the whole social body. In my opinion, the absolute number of crimes detected and judged is not at all decisive. The increase in the number of crimes brought to trial may, indeed, if due to the increase in the repressive force of justice and police, be a happy and favorable symptom. Ferri himself concedes that the fluctuations of annual criminality, and especially the increases indicated after 1832, 1848, and 1872, were largely due to the rigor of the laws and the vigilance of the police. Hence it seems to me that he should protest more energetically than he does against the conclusions that the given degrees and curves of criminality express effective opposition to law, or show the 'inclination towards crime,' — an idea which is found in the studies of Guerry on France and England. It is true that Ferri distinguishes between real, apparent, and legal criminality. To the last (statutory crime), which is represented in the figures of causes tried, too much weight is given; we see in it the criterion of the increase or decrease of public morality and the proof of a certain 'criminal saturation' produced in accordance with a determined law, superinduced by social factors in the spirit of the people toward it.

"Neither the ethical nor the naturalistic conclusion seems justifiable to my mind. At least in this aspect the absolute figures are not decisive. Wherefore, it is necessary, as Ferri himself has shown, to use other experiments in order to arrive at really certain results. The extension and intensity of crime (the one, resulting from the number of crimes brought to trial, the other, from its relation to population) have positively no decisive importance if used as an ethico-social barometer for lawless activity. Aside from external causes which may determine the increase or decrease of the number of crimes (peace or war, cost of living, poverty, epidemics and other calamities), the absolute number of crimes actually punished is certainly not so annoying a symptom as the number of transgressions for which justice exacts no expia-

tion. Thus the relatively higher figures of delinquency may be a relatively favorable symptom."

I might make many observations but I shall remark only that in statistics there may be not only too much caution but also too much carelessness, and that both are harmful. Nor shall I repeat what I have said on the method to be pursued in the study of criminal anthropology. I shall content myself now with the remark that the task of biological and statistical observations, confused by Oettingen, are not the same; and that the statistics of impersonal numbers are not greater in importance and result than personal observation, which gathers facts by the study of a mass of individuals, with the same method and the same instruments. As Cheysson says, contrary to statistics and its summary totals, "monographic labors seize upon a typical fact and penetrate it to the bone." Nor shall I recall that a great many of the propositions of Oettingen relative to statistics had already been applied by me in "Studi sulla criminalità in Francia" and in "Delitto in rapporto alla temperatura." For example, the necessity of taking the legislative changes and the number of police agents into account; the necessity of studying not only the more serious crimes but also the lesser offenses; the classification of the three groups (anthropological, telluric, and social) of the causes of crime, a classification used by many writers on criminal statistics; finally the proportion of acquittals and the various kinds of punishment — a question to which I gave my attention in a degree too rarely found in the preceding labors in criminal statistics.[1] Putting aside these personal observations, I will touch only upon those which have a general importance in the use of statistics in studying criminal sociology.

§ 111. Use and Abuse of Statistics.

Beginning with consideration of the very limited confidence which Oettingen and many others accord to abstracts of statistics (without remarking that they always come back to statistics because they have no alternative), I admit, that if they wish to

[1] The two preliminary studies which I began in my "Studies on Criminality in France" are: I. "On the value of statistical data as a faithful representation of actuality (real, apparent and statutory criminality).— II. "On the manner of comparison between different periods, regard being had to legislative changes." (Rome, in the "Annali di Statistica" 1881.) And "Das Verbrechen in seiner Abhängigkeit von dem jährlichen Temperaturwechsel," Z. G. S. (1882); "Variations thermométriques et criminalité," A. A. C. (1883).

emphasize the imperfection of statistical data in order not to lose sight of the fact that such data give only a certain degree of probability and not absolute certitude nor photographic accuracy, then we are in perfect accord with them. But if they recognize no value in statistical observations, I cannot accept their verdict. Otherwise, by mere force of argumentation, such very curious conclusions could be reached, as, for example, the following: "What crime are you making notes of? In the accusation there is only suspicion; in the preliminary investigation, only an incomplete notion; in the trial, only the unknown quantity of a problem; in the verdict, only a theme of debate; in the sentence only the opinion of a judge. Thus, statistics, based upon elementary data always denied, uncertain, and changing are like a lever wanting an *ubi consistere*." [1] The significance of this is, that by reason of exaggeration in discussing the imperfections of statistics and all the other means of scientific research, one comes, thanks to the "suspicions" at the time of arrest, the "unknown quantity" of the trial, and the "debate" of the verdict, to a disregard and elimination of two or three thousand murders which, good year or bad, are annually committed in Italy. Certainly the same is true of statistics as of anything else: a rational use of them may be made or they may be abused by empiricism or by reliance upon an "a priori" theory. But, aside from all futile discussion, we should oppose statistics with a distrust, even excessive, — with a scepticism, even exaggerated, when a fact is brought to our attention in their name which savors of the miraculous or which is not explicable without them by the recognized general laws of psychology and sociology. When statistical figures present a fact, however unexpected, which the statistician shows in a natural and constant relation with some law antecedently admitted and verified, then it is perfectly right to say that the presumption of truth is in its favor; that, in any event, if the unpleasant facts, which have been brought to light, are to be disputed, they must be contested not with syllogisms alone, but by other facts which destroy and contradict them and which in turn are supported by other laws not less general and positive. Such is the reply which may be made, for example, to those who by an obvious contradiction and incomplete use of statistics, assent that alcohol is not a factor in crime, since the States and provinces which consume the most do not record the greatest number of homicides

[1] *Salpace* (Pascal), "Uso e abuso della statistica" (Roma, 1885), p. 31.

and other offenses.[1] It would really be a miracle if a cause undeniably pathological with individuals ceased to be the same with the mass of these same individuals. The truth is, that alcoholism, not being the sole factor in crime, may, in the different countries, be neutralized by other predominant factors, such as race, or social environment.

§ 112. Ethico-social Inductions from Criminal Statistics.

On my part, I must make a serious objection to the projects of "ethico-social" judgments which Oettingen has seen fit, with some precaution, to institute on the data of criminal statistics. That is to say, he, with many others, talks of moral statistics, while I think that simply criminal statistics should be taken. Oettingen is doubtless right as against those who, like Legoyt, Hausner, and more recently Levi,[2] think that they can construct a scale of comparative national morality from criminal statistics; but in my opinion he falls into a similar error, when, as we have so often seen, he speaks of the ethico-social significance of the data of criminal statisics. That is why I have never drawn any ethico-social inductions from comparative criminal statistics. Never, even in the case of a single country, have I spoken of "the criminal tendency in the life of the people." Criminal statistics tell us this and nothing more: — In such a year there was more or less crime than in other years. Now, on the one hand, I affirm that these simple data cannot justify any ethico-social judgment even when it reaches the highest degree of precision, representing crimes actually committed and not merely those which have been discovered and tried, because the morality of a people embraces too many elements that this data does not include. Let us even admit, with Mayr, that criminal statistics are but part of moral statistics which should also make its induction from the demographic figures of marriages, divorces, births both legitimate and

[1] *Tammeo*, "I delitti, saggio di statistica morale," R. C. (1881–1882), p. 56; *Fournier de Flain*, "L'alcool et l'alcoolisme," R. S. (14 August, 1889). And in a more absolute way, *Colajanni*, "L'alcoolisme" (Catane, 1888), although he cites neither Tammeo nor Fournier, who, less absolutely than himself, had maintained the same thesis.

[2] *Levi*, "The Progress of Morals in England," cited by *Bosco*, "Gli omicidi in alcuni stati d'Europa" B. I. I. S. (Rome, 1889). See also, *Inama Sternberg*, "Zur Kritik der Moralstatistik," in the "Jahrbuch für Nationalök. und Statistik" (1883), p. 505; *Falkner*, "Crime and Census," in the "Annals of American Academy of Political Science" (January, 1897), and in the "Zeitschrift für Criminalanthropologie" (1897), fasc. 3.

illegitimate, the number of suicides, and education. Yet the loyalty of the people, their honesty in civil and commercial relations, the family relationship, the degree of moral and civic education, public charity, the manner in which, aside from public charity, the disinherited classes are treated, — what have all these in common with criminality? And yet they are so many important factors in the moral life of a people. The truth is, as Ortolan and Messedaglia have observed, that "the statistical study of moral conditions can only be made by means of exterior indices, and these indices are for the most part drawn from facts indicative of disorder. Order is less readily discerned and felt because it ought to be the rule. One perceives the beatings of the heart only when they have become irregular. It is death which measures life. In like manner morality is defined and measured by immorality; respect for law, by the infractions which violate it and by crime." [1]

§ 113. Criminal Sociological Demands of Statistics.

But on the other hand, the elementary data of criminal statistics suffices for the purpose and needs of criminal sociology. In reality, it more or less notes the annual and periodical movement of crime, whether apparent (discovered and denounced) or legal (brought to trial),[2] and from this data criminal sociology attains to a study of the most general and evident causes. But it does not attempt, I repeat, to judge so complex, fluctuating, and diverse an entirety as that of a people's morality, by a single unilateral and negative element.

§ 114. Biological Aspect of Criminal Statistics.

This is the sociological aspect of criminal statistics to which the biological should be joined, since statistics must be consulted as to the variable and proportional participation of different ages, sexes, and professions in criminal life. But, although the individual or biological side of criminal statistics has been actively cultivated, the social side has been neglected. Yet it is principally from this that the sociologist and legislator can and must seek indications for social pathology and therapy. When we understand the part played in crime by the different ages, sexes, profes-

[1] *Ortolan*, "Éléments du droit penal," I, 646; *Messedaglia*, "Le statistiche criminale dell' impero Austriaco" (Venice, 1867), p. 8.

[2] I have shown by minute calculations in my "Studi sulla criminalità in Francia," that they are in approximate relations of equivalence with each other.

sions; by the civil status and education, we find ourselves face to face with effects deeply rooted, not only in social, but also in the organic and psychic conditions of man (less difficult of comparison and less variable historically.) And then, after surmounting the difficulty of making the legislator understand the data of sociological observation, we may outline them in a very restricted way and by indirect means. If, on the other hand, we have determined the influence which a civil law, a police regulation, an excise tax, an institution of public charity, or a measure relating to commerce, agriculture, or the like, exercises on criminal activity, we find ourselves confronted with effects purely social and consequently under the more direct and efficacious control of the lawmaker. Then the legislator, with an adequate knowledge of the social factors of crime and their respective force, can not only correct exaggerated or false ideas on the importance of certain remedies, but even suppress or modify the causes of disorder by preparing a different social organization and thus organizing a truly effective defense against the criminal activity of man. Natural forces can be overcome only by opposite and divergent natural forces. Hence, the criminal sociologist, abandoning the sterile illusion that crime springs from the fiat of individual free will, will determine first of all the direction and intensity of the natural forces which produce crime in order to know how to oppose them by other natural forces protective of right, which will fructify lawful activity and honest energy. This is also the reason why the data of criminal statistics, which we shall study in this chapter, comprehend the social side of crime as more important and less explored by scientific research, for complete light has been shed upon it only by the new direction of criminal sociology.

§ 115. Statistics and History.

In the study of this sociological side there are some who think that criminal statistics should be not only aided but controlled by historical research. They contend that in gathering and studying the factors of crime, the statistical phase is not enough without the evolutionary movement of succession afforded by history.[1]

[1] *Colajanni*, "Sociologia criminale," II, pp. 46, 47, 54; *Neumann*, "Sociologie und Statistik," in "Statistica Monat." (Vienna, 1878); *Vanni*, "Prime linee di un programma critico di sociologia" (Pérouse, 1888), § VI.

And, for general statistics, *Juglar*, "Les tableaux statistiques portent-ils les traces des événements historiques, politiques et économiques?" "Journal de la Société Statistique" (Paris, July 1, 1898).

The thought that history can aid statistics is right, although it is inexact to say that statistics give only a static moment. The idea is not new and from it comes the erroneous definition of Schlöser to the effect that "history is statistics in motion and statistics history at rest": yet (although under different modes) coexistence and succession are common to both history and statistics. What is inexact is the other idea that history serves as a control for statistics. I will not insist upon the fact that history, as generally written, is but the superficial and sterile registration of the external and apparent events of social life, or that history does not go deeply into physical, psychological and sociological conditions. It is very true, however, that history, even when treated in a positive spirit and with a positive method, can of itself give only qualitative elements, while those given by statistics are essentially quantitative: hence it is hard to persuade oneself that one can accurately control the other.

§ 116. Distinction between Natural and Legal Crime.

Let us, therefore, eliminate this control. As a rule of method in gathering and studying statistics one thing, to which in my opinion not enough importance has hitherto been given, is the distinction between the forms of natural and legal crime. Every law promulgated is a direct or indirect source of infractions which go to swell the figures of penal statistics. A mania of legislation thrives today in civilized countries, whose short-sighted governments do not look beyond the symptoms of social pathology and who oppose a new prohibitive law to each new or more acute symptom. Thus they multiply laws, but not their preservative efficiency, while the causes of these symptomatic facts remain intact or even become envenomed. Therefore it is evident that in the study of long statistical series we are confronted [1] with a numerical increase of violations of a purely contraventional character or of "purely political creation," which have very little relation to natural crime, which is of greater interest because it destroys the conditions of social existence. Thus, without even going out of the domain of statistics, "the discussions and controversies which have taken place in Italy, Germany, and England on the increase or decrease of crime, arose because of a failure of the necessary separation of natural from political crimes and contraventions, or because of its impossibility by reason of the defective

[1] *Ferri*, "Études sur la criminalité en France" (1881).

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manner in which the statistics were prepared."[1] It is necessary and urgent that this distinction between natural and legal crimes should always be regarded in the data and inductions of criminal sociology. As we have seen, it is rooted in criminal anthropology and we shall see it applied to all of the researches of criminal statistics — on the relation between civilization and crime, on the movement of criminality in Europe, on the personal qualities of criminals, on the law of criminal saturation. We shall see it shown accurately in the separation of ordinary from politico-social crime. This distinction is fundamental: without it, confusion would reign in the researches of criminal anthropology and statistics and the conclusions from these studies would be extravagant. Without it, we could not discern nor regulate the double origin and function of penal justice which we shall take up at a later point. These incrustations of class defense (which easily degenerates into class tyranny) against the forms of legal crime, add to the primitive and permanent kernel of social defense against the forms of natural crime. The most violent, most ineffective, most iniquitous repression, through lack of appreciation of the bio-social genesis of the double series of attacks on the conditions of social existence, will no longer be employed indiscriminately for both.

[1] *Bosco*, "Lo studio della delinquenza e la classificazione dei reati nella statistica penale," in the "Bulletin, Indust. intern. Stat." (1892), VI, p. 2, p. 184.

CHAPTER II

CIVILIZATION AND CRIME

Relation between honest and criminal activity. Anthropological, physical and social factors of crime.

§ 117. Evolution of Crime. Pathological Incidents of Civilization.

After thus developing the method of observation and interpretation of the data of criminal statistics, and before making in broad outline a positive examination of it, another observation of a general character requires consideration. One of the questions which arose at the very beginning [1] of criminal statistics, in the presence of the continual increase of crime in the civilized countries of Europe, was the relation of civilization to crime as well as to insanity and suicide. Evolution, whether in the sociological or biological order, does not of itself necessarily imply absolute progress; but advance in one direction is accompanied by some reaction in another, notwithstanding the uninterrupted ascent as a general resultant. Hence it is that one may say of civilization, especially in its manifestations, often pathological, at the end of the nineteenth century, and of the decline of the bourgeoise régime, what is said of degenerescence in the biological domain.

§ 118. Evolution of Crime in Civilization.

As every progressive evolution is accompanied by a retrogressive evolution of the preceding forms and functions, so even degeneracy itself may be accompanied by progressive evolution. In the same way that genius is the sublime product of a biological degeneracy accompanied by inferior manifestations (impulsive-

[1] *Romagnosi*, "Osservazioni statistiche sul resconto della giustizia criminale in Francia," in the "Annali Universali di statistica," 1829, XIX, I; *Lombroso* "L'uomo delinquente," 2d ed., pp. 251–269, and 5th ed., vol. III, p. 46; *Messedaglia*, "La statistica della criminalità" (Rome, 1879), pp. 35 *et seq.*; *Oettingen*, "Moralstatistik," § 48; "Bildung und Sittlichkeit" in the "Baltische Monatschrift," XXX, 4, pp. 333, *et seq.*; *Tarde*, "La statistique criminelle," R. P. (January, 1883), and "Criminalité comparée," Cap. II and Cap. IV, § 3; *Turati*, "Il delitto e la questione sociale"; *Ferri*, "Socialismo e criminalità."

ness, lack of balance, dull sensibilities), — so also civilization, alongside of the most brilliant manifestations of human progress, exhibits to us the toxic products of the special criminality proper to it, of suicide, or insanity.[1] For my part, I think that, putting aside the causes of equivocation that come from the different meanings given the word civilization which we should understand as simply expressing, without teleological preoccupation, the evolutionary movement of social life, we could say with Messedaglia, that civilization, like barbarism, has its own characteristic criminality. Furthermore, in opposition to the primitive thesis of sentimental socialism which attributed the origin of crime to bourgeoise organization, I argued and I argue (with the assent to-day of scientific socialism) that every phase of civilization has its peculiar criminality which corresponds to it. As there was a criminality of violence and bloodshed in feudal society, and a criminality of robbery and fraud in bourgeoise society, so the criminality of society of the future will have its own appropriate character. Two phenomena may be met in the history of crime: first, as Tarde has observed, civilization reabsorbs successively the forms of criminality which it has determined and determines new forms; second, crime undergoes a double morphological evolution which makes it the typical expression of each historical period for each social group. Leaving aside the extension of crime due to special laws in the forms of purely conventional delinquency, natural crime passes more and more from the material forms of violence into the intellectual forms of cunning and fraud. It thus reproduces the evolution by which man ceaselessly gets further and further away from his animal and savage origin. Crimes against property, especially in the numerous forms of indirect robbery, become more and more numerous in comparison with crimes of bloodshed. Even the latter assume forms more and more intellectual, and homicide itself is contrived with craft instead of violence. The brutal infanticide which Tolstoi pictures in the "Puissance des ténèbres" where he describes the father who crushes his child under a timber in a cave, is succeeded by the sophisticated infanticide which d'Annunzio represents in the "L' Innocento" where he describes a father who gives his new-born

[1] *Carpenter*, "Civilisation, its Cause and Cure" (London, 1889); *Demoor, Massart* and *Vandervelde*, "L'évolution régressive" (Paris, 1897); *DeGreef*, "Le transformisme social" (Paris, 1896); *Lombroso*, "Genio e degenerazione"; *Ferri*, "La réhabilitation des anormaux," "Revue des Revues" (15 February, 1889).

child pneumonia by exposing it to the blasts of a Christmas night.[1] Thus in Italy we have seen brigandage transformed in these last years and pass from the armed robberies of the Middle Ages and from ransoms demanded of its victim, into the pensions which Tiburzi received and which Varsalone receives from great proprietors for protecting them against the smaller thieves.

§ 119. Evolution of Crime.

In regard to the law of social stratification, we see that the increasingly intellectual evolution of crime results in the shortening of the passage from the popular strata to the so-called superior classes, which implies the abandonment of violent and impulsive for astute and cunning forms. This transformation is verified by analogy between the social progress and criminality in the subdivisions of the same country, and in their relation in the less progressive countries of Spain, Italy, Greece, Hungary, and Russia, and the more progressive countries of Northern Europe. The same transitions are observed in North America in going from the backward States of the Southwest to the more advanced Northeastern States.[2] Again, and parallel with this morphological outline, which it is true does not express a real support of moral sentiment, crime passes from the acute and sporadic state to the chronic and epidemic. Superficial observers have spoken of an end-of-the-century ("fin de siècle") criminality, but the expression is meaningless because the arithmetical division of time is quite arbitrary. Max Nordau speaks of a criminality indicative of the end of the race ("fin de race"); but it is more exact to say with Sighele that there is question of a criminality of the end of class ("fin de classe") since in our day we see reproduced in the bourgeoise class the phenomena of social degeneracy which two hundred years ago announced the end of the then dominant classes and which caused Voltaire to say that he had "great desire to walk on four paws." [3]

[1] *Ferri*, "I delinquenti nell' orte" (1896).

[2] *Niceforo*, "L'Italia barbara contemporanea" (Palermo, 1898); *Bosco*, "Gli omicidii in Europa"; "L'omicidio negli stati uniti," *ibid.*, X, 1; *Ferri*, "L'omicidio," pp. 250 *et seq.*

[3] The author, no doubt, alludes to the well-known letter of Voltaire to Rousseau (30 August, 1755). In this case the expression of Voltaire does not bear the construction given to it: it merely scoffs in a just, if sarcastic way, at the chimerical ideal which Rousseau seems to have pictured to himself of primitive savage men, according to him perfectly moral and perfectly happy, and to whom civilization only brought inequality, vice, and misery.

§ 120. Crime and Education.

In fact, we observe every day that criminality under certain intellectual and disguised forms is not restricted to the "putrid environment," of which Tarde recently spoke, but that it exists among all of the social classes, even the most cultivated. This is sufficient to show how baseless is the reproach which certain persons, with more or less avowed reactionary intent, oppose to popular education, that it contributes to the increase of fraudulent crime. As Rumelin,[1] an author above suspicion, has himself conceded, intellectual culture cannot but aid the morality of the masses, not only as an indirect influence (as maintained from Socrates to Buckle, for the reason that ignorance is a formidable source of perversity) but further, I should say, as a direct influence, since education aids in correcting or diminishing improvidence in the great mass of occasional delinquents, and this is, in their case, the most powerful stimulant to crime.

§ 121. Crime and Ease of Conditions of Life.

Since criminality is always in its general average related to the greater or lesser ease of the conditions of life, neither an Utopian return to the dominance of religious beliefs nor the barbarous proposal of restricting popular education will put an end to the criminal epidemic of the last fifty years. The remedy can only be found in an amelioration of the conditions of human existence through a more satisfactory economic organization of society. Since the symbolical cry — enrich yourself — was launched in the first half of the last century, the moral malady of "ctésomania" (mania for wealth), which makes wealth the supreme end in life and the necessary condition of happiness, it has never ceased to develop. The value of a man is caculated not on what he is but on what he has, so that contemporaneous humanity lives under the obsession of riches. Now ctésomania always leads

[1] *Rumelin*, "Problème d'économie politique et de statistique" (Paris, 1896), pp. 221 *et seq.*

See also for and against, *Fouillée*, "Les jeunes criminels, l'école et la presse," R. D. M. (15 January, 1897); *Rostand*, "Pourquoi criminalité monte en France et baisse en Angleterre," in the "Reforma sociale"; *Tarde*, "La jeunesse criminelle," in the "Revue pédagogique" (March, 1897), and "Études de psychologie sociale" (Paris, 1898); *Worms*, "L'école et le crime," B. U. D. P. (1898), I, p. 46; *Bodio*, "Instruzione e delinquenza," in the "Cultura" (February, 1895).

As an index to the wholesome influence of education, see the parallel movement of civil litigiousness and of crime, in *Fenoglio*, "Litigiosità e criminalità," in the "Reforme sociale" (25 May, 1896).

to kleptomania (mania for either direct or indirect theft). The religious idea, vanishing under the action of scientific truths, a void is made in the soul of contemporary generations, after the realization of the patriotic ideal. They encounter some snowy night the glacial breath of scepticism, which permits the free deployment of every immoral and criminal tendency. Only the great human ideal of the new generations at present prophesies the end of this night, and hence the end of this criminal epidemic to the moral conscience. In the new human civilization, which will succeed the bourgeoise civilization, as the latter succeeded feudalism, the conditions of existence will be assured to every man in return for moderate labor. And thus morality will be strengthened and elevated, for immorality develops where the struggle for existence is too painful (as the consequence of exhaustive toil) or too easy (as the consequence of idleness and parasitism). Toil, socially regulated and rewarded, will be an effective preservative against crime and vice. They will cease to be epidemic and will be restricted to isolated cases of acute pathology, when the new civilization will oblige every human being, except the infirm and children, to toil productively in some form or other whether manual or intellectual (and the separation between the two will always continue to decrease); and when it will assure every man, in return for his labor, an existence worthy of a human creature, and not the life of a slave or a beast of burden. But these relations between civilization and crime exceed the limits of statistical researches since they do not go back prior to 1800 and therefore always reflect the period of bourgeoise civilization. We can at most take from the annual series of criminal statistics periods of crisis and of calm, which are reflected in the intensity and extension of delinquency. These abstracts of statistics we shall presently take up in studying the general movement of crime in the principal countries of Europe.

§ 122. Numerical Increase in Crime Shown by Statistics.

Aside from the general problem of the relations between civilization and crime (of which no solution can be given by statistics alone which until now apply to relatively short periods and because such relations properly belong to historical sociology), there is a more rigorously statistical question connected with this problem which should be examined. I mean the general interpretation and sociological import attributed to the figures of statistics

which attest the numerical increase of crime in our own time. The idea has long since occurred to some observers of criminal statistics that the increase in the number of crimes should be attributed not to an increase of individual energies or tendencies but rather to the increasing number of occasions and external incentives due to a multiplication of legal relationships and of moveable property. Thus, for example, in 1828, on the occasion of a debate in which Peel, in the House of Commons declared that as civilization advanced property became less respected, Lucas observed that "the progress of civilization augmented the number of useful things and the cupidity, naturally excited, found more occasions of usurpation and hence more temptations. Growing civilization affords more things to be stolen, hence crimes should multiply. It is not, therefore, because property is more exposed to theft but because there are more properties exposed to theft. Furthermore, as the progress of civilization is only that of individual liberty it spreads the abuse with the use. To make a sane estimate of the morality of human liberty and of civilization, the extension of the abuse should be judged in comparison with the extension of the use." [1] More recently Jellinek in Germany and Messedaglia in Italy, without mentioning others, have expressed the same idea.[2] It was for this reason that I, in turn, in my "Studi sulla criminalità in Francia" [3] confronted the numerical increase of crimes and delicts not only with legislative variations, which change the material extension of the data by creating new forms of offenses and not only with the increase of population, — but also with the number of judicial police agents, who both increase the number of discovered offenses and give more frequent occasion for certain offenses, such as resistance and violence, and finally, with the increase of wealth and exchangeable commodities. For a more complete explanation and a more accurate interpretation of statistical data, this observation possesses an incontestable and undisputed value. But more recently Poletti assigns it a much wider range.[4] In accord with my "Studi

[1] *Lucas*, in the "Bulletin of M. Ferussac" (September, 1828), p. 188, III.

[2] *Jellinek*, "Die sozial-etische Bedeutung von Recht, Unrecht und Strafe," (Vienna, 1878), p. 79. So even before him, *Avé Lallemant*, "Das deutsche Gaunerthum," II, 34, cited by *Schaeffle*, "Bau und Leben des socialen Körpers"; *Messedaglia*, "La statistica criminale dell' impero austriaco" (Venice, 1867), p. 13; "Alcuni argomenti di statistica teorica," "Archivio di statistica," V, 1.

[3] Published in 1881.

[4] *Poletti*, "Del sentimento nella scienza del diritto penale" (Udine, 1882), p. 79, 81.

sulla criminalità in Francia," he observed that in the period from 1826 to 1878 crime increased from one hundred to two hundred and fifty-four, while in the same country, the imports had increased for the same period from one hundred to seven hundred, the exports in about the same proportion and the national budget from one hundred to three hundred. Nor was that all. He further showed, always conformably to my book, the progression of the mutations of personalty and realty, of charitable institutions, of mutual aid societies, of agricultural production, of the consumption of wheat: he considered that this progression indicated "in the social activity of France" for this period (1826-1878) a development which found in the corresponding increase of the public revenues (from one hundred to three hundred) its most faithful total expression: and he drew from these comparisons the conclusion that "in French criminality in the period from 1826 to 1878 there was no increase but a positive decrease." [1] In this appreciation by Poletti, if we put aside the grain of truth contained in the primitive idea expressed by others before him, the rest lacks scientific accuracy in two particulars. The first is that the mathematical expression of this idea is impossible: the second, that for this very reason practical applications of the idea are extravagant and arbitrary. The mathematical or even the merely precise expression of a comparison between criminal and economic activity is impossible for the simple reason that if we could approximately fix the first term of the equation by the number of offenses prosecuted and tried, we could not, as to the second, in view of the infinite variety of elements which compose it, give even an approximate total value. And again, as I have said elsewhere,[2] only an arbitrary and inexact comparison can be made between the percentage of crime and that of certain forms of economic activity. What relation is there really between an increase of crime from one hundred and fifty-four per cent. and an increase of six hundred per cent. in commercial activities? Furthermore, as Tarde asks,[3] could there be a relation between the number of thefts and of sales or leases?

[1] See *Poletti*, "Del sentimento nella scienza del diritto penale," pp. 79–81.

[2] *Ferri*, "Socialismo, psicologia e statistica nel diritto criminale," A. P., IV, 2, 1883, p. 235.

[3] *Tarde*, "La statistique criminelle," in the R. P. (1883), p. 56, and "Criminalité comparée" (Paris 1886).

§ 123. Actual Increase in Crime.

For this reason the applications of this idea made by Poletti to criminality in France and Italy are arbitrary and extravagant. They are arbitrary because it is not proven that a certain percentage of decrease or increase (even conceding that a comparison were possible) has the same value in the case of crimes as in the case of commerce, imports, or the consumption of foodstuffs. How can one say that "the social activity of France" (indeed so imperfectly represented) having increased in fifty years two hundred per cent. and the criminal activity only a hundred and fifty per cent. that therefore there results "a positive diminution" in French criminality? This is another verification of the bio-sociological law mentioned in the last chapter, according to which the most important vital elements undergo the slightest variations, yet these variations have the greatest importance. In a social sense, therefore, I am of opinion that an increase of ten per cent. in crime (especially homicide and brigandage) has greater significance than an increase of thirty per cent. in the exportation of grain or the receipts of the budget. Otherwise one might say, Tarde observes, that the comparison of the more frequent and dangerous immoralities of city life (which have developed remarkably) with the enormous number of recorded adulteries discloses a real progress in the chastity of women. Certainly business is more active but it is equally certain that we run greater risk now than fifty years ago of being robbed, cheated, or swindled. Further, if we pass from the objective criteria of crimes to the subjective criteria of criminals, it is my observation that in France, for example, while there were, from 1826 to 1830, one hundred and fifty-two persons in each hundred thousand charged with correctional delicts, — from 1875 to 1880 there were one hundred and seventy-four: This means that the increase of crime is not only numerical and absolute, but that it occurs proportionately to population. Retaining the primitive idea of Poletti's theory, that is affirming in the last analysis the necessity of a double criterion, the increasing population on one hand and the increasing activity in the surveillance of criminals on the other, the positive school has opened up an entirely new field of fertile observation by classifying the factors of crime. I took occasion in my "Studi sulla criminalità in Francia" to collect in three natural groups all the various causes which determine delinquency. Prior to its pub-

lication they had been indicated only in a fragmentary and disorderly way, without any causal connection, as in the two chapters of Bentham,[1] in the writings on criminal statistics, and in the work of Lombroso. In the discussion of suicide (another phenomenon of social pathology), they have been grouped by Morselli into a better organized but still feebly classified series.[2] Therefore, viewing the honest or dishonest actions of man as always the product of his physiological and psychical constitution and of the physical and social atmosphere in which he is born and lives, I have distinguished the following three catagories: anthropological factors or individual factors of crime; psychical factors; and social factors.

§ 124. Anthropological Factors in Crime; Organic Constitution of the Criminals.

Anthropological factors inherent in the person of the criminal are the first coefficient of crime. Since a criminal, like other men, may be considered either as a separate individual (and thus considered either physiologically or physically), or as a member of society and as such having various relations with other men, the anthropological factors of crime group themselves under three subdivisions. To the first (organic constitution of the criminal) belong all the organic anomalies of cranium, brain, viscera, of sensibility and reflex activity, and of all bodily characteristics in general, such as peculiarities of physiognomy and tattooing. These have been brought to light by the numerous labors of criminal anthropology, and brilliantly collected and supplemented in the work of Lombroso. They will assuredly be followed by new researches in greater number and with increasing fruitfulness.

§ 125. Anthropologic Factors in Crime; Psychical Constitution of the Criminal.

To the second subdivision (psychical constitution of the criminal) belong all the anomalies of intelligence and sentiment, es-

[1] *Bentham*, "Principles of Legislation," Chap. IX, X, enumerated "the circumstances which influence sensibility" and of which "account must be taken in matters of legislation" as: temperament, the basis of everything — health — strength — bodily imperfection — culture — intellectual faculties — strength of mind — perseverance — inclinations — ideas of honor — religious ideas and feelings of sympathy and antipathy — madness — financial conditions — sex — age — social class — education — customary occupation — climate — race — government — religious profession.

[2] *Morselli*, "Suicidio" (Milan, 1879), p. 49.

pecially the social sense, and all the peculiarities of the literature and jargon of criminals. On all these points, sufficient data have already been collected, and will be more and more enriched after the preliminary development necessarily given to organic researches, for, in the genesis of crime, the moral temperament appropriate to delinquents is of the highest importance.

§ 126. Anthropological Factors in Crime; Personal Characteristics of the Criminals.

In the third subdivision of anthropological factors (personal characteristics of the criminal) are embraced, aside from the biological conditions of race, age, and sex, the biologico-social conditions, such as civil state, profession, domicile, social class, instruction, and education, which hitherto have been studied almost exclusively by persons concerned with criminal statistics.

§ 127. Physical Factors in Crime.

Then comes the series of physical factors (cosmo-telluric) of crime. These include the causes belonging to the physical environment, all very efficient, as criminal statistics prove, in the production of different manifestations of crime. Such are climate, nature of the soil, succession of day and night, and seasons, the annual temperature, atmospheric conditions, and agricultural production.

§ 128. Social Factors in Crime.

Finally, there is the category of social factors of crime which result from the social environment in which the delinquent lives, such as: different density of population, the state of public and religious opinion, the constitution of the family, the educational system, alcoholism, the economic and political organization, organization of public administration, justice, and judicial police, and finally the civil and penal legislative system in general. These contain a multitude of latent causes which overlap, intervene, and combine in all of the least apparent functions of social life and which almost always escape the attention of theorists and practitioners and of criminologists and law-makers.

§ 129. Classifications of the Factors in Crime.

This classification of the factors of crime, which has been accepted by the greater number of anthropologists and criminal sociologists, seems to me not only more complete and better

ordered than that of Bentham or Morselli, but also more accurate than those which have since been proposed for the study of crime. I shall not speak of Lacassagne's classification which is fundamentally identical with my own (published earlier than his) in which he considers the physico-chemical, biological (or individual), and social factors, which intervene in the production of crime. Yet it has been declared by Puglia[1] that our classification was taken bodily from the "Saggio critico sul diritto penale" of Bovio. And Colajanni later even went so far as to say that Bovio's classification was even more complete.[2] Bovio's "Saggio critico" maintains, first of all, that penal law contains an intrinsic contradiction because of the impossibility of establishing an absolute ratio between crime and punishment which are things of entirely different nature. This impossibility had before been shown by Conforti, Tissot, and Ellero. The opportunism of other classic criminologists, who have attempted an empirical solution of the problem, does not at all weaken this condemnation inflicted on penal law by metaphysical deduction itself.

§ 130. Ratio of Civil and Penal Justice.

It is asserted that penal justice is in inverse ratio to civil justice, an idea already developed by Filangieri throughout his work "Scienza della legislazione" and particularly in the conclusion of his third chapter which treats of criminal laws. It was Filangieri who wrote the eloquent phrase: "When the citizen is no longer protected by the sword of justice he resorts to the poignard of the assassin." As early as 1861, Maine in his classic work on "Ancient Law" pointed out the more considerable extension of penal laws as a general trait of primitive peoples.[3] And further, even from the statistical point of view, de Candolle in 1830, and Zincone in 1872, in an obscure little work, accurately brought out the preventive influence of civil justice on crime.[4] In any event,

[1] *Puglia*, "Risorgimento e avvenire della scienza criminale."

[2] *Colajanni*, "Sociologia criminale" (1887), II, 40.

[3] *Maine*, "Ancient Law," Chap. X. *Carle* makes the same observation of Germany in the Middle Ages in "La vita del diritto ne' suoi rapporti colla vita sociale" (Turin, 1880), p. 237; he always attributed the predominant development of penal disposition in Germanic law to the controlling idea of individualism, — an ingenious explanation, but one which needs to be supplemented by the idea of the primitive imperfection of the civil law.

[4] *De Candolle*, "Sur la statistique des délits," in the "Bibliothèque Universelle de Genève" (1830); *Zincone*, "Dell' aumento dei reati" (Caserte, 1872), pp. 50 *et seq.* See also *Spencer*, "Trop de lois" (published in 1853), in the "Essais de politique" (Paris, 1879), pp. 63 *et seq.*

it is a fact that the historical evolution of crime occurs through a continuous substitution of civil in place of penal laws for the defense of individual and social rights.

§ 131. Criticism of Colajanni's Classification of Crime.

As to the triple coöperation of nature, history, and society with the "personal factor" in the determination of crime, which in Colajanni's opinion would be a more perfect classification of the factors of crime than mine, there is present an inexact conception that cloaks an outgrown idea, — a metaphysical idea, and consequently it has very little in common with my classification of criminal factors. Really, what is history and how does it determine crime? History does not exist of itself and only acts as a biological condition of the hereditary, physiological, or psychological dispositions of the individual; or as the social condition of customs, public opinion, family, economic, or political organization. Therefore the only influence which history can have on crime is like nature (anthropological and physical factors), or like society (social factors). Of itself it is only the redundancy of syllogistic symmetry. And when they discourse on the "personal factor," *i. e.*, individual free-will with the concurrence of the natural factor employed by history and society in the determination of crime, who fails to see that the problem is left in the antiquated metaphysical circle and that there is always the question of moral liberty of which the wings are more or less clipped? In conclusion, we always find ourselves confronted by the animism of which we have already spoken and in the name of which, Tarde, for example, in criticising my classification of the criminal factors declares "that the employment of organic potencies, the realization of those virtualities which constitute the personal factor and which are in a measure susceptible of direction, depend, in crime or virtue, on the conscious and voluntary personality which has accentuated them for good or evil."[1] I repeat that thereby they intend to indicate the concurrence of the physico-psychical make-up of the individual, that is, the anthropological factors in the origin of crime (and in such case there is no reason to distinguish the very factors which constitute the personality of the delinquent and which, being factors of the physical and social environment, are necessarily determined in accordance with the

[1] *Tarde*, "Le deuxième congrès d'anthropologie criminelle," in R. S. (30 November, 1889), p. 687.

laws of natural causality); or else (and this is what our critics really mean) it is only the question of a contraband free will.[1] It is, therefore, inexact to say that the classification of criminal factors which I have proposed was borrowed bodily from Bovio, or that it needs to be supplemented by the joinder of "history" and the "personal factor." So true is this that Colajanni himself is forced to admit that "the value and efficiency of history and the personal factor can only with difficulty be directly illuminated . . . and hence the study of the factors of crime should be restricted to the physico-chemical, anthropological, and social."[2] This is why Colajanni, in his first volume, after criticising all of the data of criminal anthropology with a great reserve of syllogisms and with inexcusable errors of fact, finally accepts the two most important conclusions, on atavism and on the classification of criminals that we had drawn from such data. And he does the same in his second volume where he criticises my classification of criminal factors at the start and finally "restricts his study" to the only factors that are enumerated in that classification.

§ 132. Criticism of Aramburu's Classification of Crime.

Finally, as germane to my classification of criminal factors, I will say only a word about the objection made me by de Aramburu and others charging me with having confused the accessory with the principal, and the purely accidental causes with those which are really determinative.[3] That is an ancient distinction of the traditional philosophy which has no serious value. All of the necessary conditions in the determination of a phenomenon are the natural causes of such phenomenon, and there is no essential difference but only a difference in degree between accessory and principal or between what is determinative and what is occasional. The heart is a principal organ and the vein an accessory, but both are absolutely necessary to the animal organism. Without the determining occasion, an event does not occur notwithstanding all of the other causes which have preceded. The drop of water is occasional but without it a liquid would never have overflowed.

[1] See P., III, *post.*

[2] *Colajanni*, "Sociologia criminale," p. 43.

[3] *De Aramburu*, "La nueva ciencia penal" (Madrid, 1887), p. 115. I have replied to this in the preface to "Nuevos horizontes del derecho y del procedimiento penal" (Madrid, 1887), translated into Italian by *Perez Oliva.*

§ 133. Criticism of Tarde's Classification.

I prefer, lastly, to make reply to the two more recent objections of Tarde. The physical factors, he says, should not constitute a separate category since "they are active only when identified with anthropological or social factors. Climate, or the seasons, do not of themselves contribute in any way to the increase or decrease of the contingent of crime. Their action is limited to figuring in a number of very complex causes which modify the organic or social causes whose concurrence is necessary in the production of crime." And at a later point he says: "The more elevated an organism is, the more it escapes the servitude of physico-chemical excitations and even though it uses up all of the energy which it has stored, it acquires more and increasingly disposes of these excitations and freely directs them to its own ends." "Let us then eliminate physical factors by distributing them among the biological and social factors." [1] Leaving till the next part the question of this pretended direction, which every superior organism claims that it can give to the physico-chemical energies which give it life, I reply that if this be true, then the social factors themselves only act with the biological conditions of the delinquent. Poverty, morals, traditions, and the political order are of themselves impotent, like climate, if their influence does not affect a determinate human organism which shows either an honest or a criminal reaction. I shall not discuss another objection of Tarde that denies the influence of climate because, if the warm season in our hemisphere determines an increase of personal attacks, Corre has demonstrated, on the other hand, that in creole countries they increase in the cool season. This fact can only confirm the influence of climate and the seasons on crime. This influence is shown in different ways according to the different conditions of different organisms in different environments, but which is none the less effective. As Corre has pointed out, the hot season in our countries acts as a stimulant because it is temperate; in tropical countries, on the contrary, it is depressing because excessive. This is why, in temperate zones, personal attacks, which are more directly dependant on thermal conditions, are more numerous in the hottest season while in the tropics they occur when the season is least hot.[2] Thus, the criticisms of Tarde

[1] *Tarde*, "Le deuxième congrès d'anthropologie criminelle," p. 687.

[2] *Corre*, "Le crime en pays créoles" (Lyons, 1889), p. 117; he controverts those

have nothing solid or positive like the last, or else, if given all of their logical consequences, they would, contrary to his idea, terminate in the elimination not only of physical, but also of social factors, because neither operate of themselves directly, but only by the influence which they exert on the organism of the individual.[1] We, therefore, consider the classification of the factors of crime into anthropological, physical, and social as established, to be the only one which answers both to the reality of facts and to the necessities of the study.

§ 134. Complexity of Origin of Crime.

In connection with this classification there come to mind two basic observations on the general relations of the criminal movement and the practical effects which are obtainable in the defense of society against crime. The first is that in view of "the unexpected bond noticed between the different natural agencies hitherto regarded as independent," [2] we cannot obtain a sufficient natural reason for an isolated crime or for the entirety of crime unless we consider each factor separately as well as all together. Even if we isolate these factors for the purposes of study and reflection, yet in nature they always act together and form an indissoluble group, a fact which makes all of them more or less necessary in the origin of crime. This simple consideration suffices to show the utter inaccuracy of the contrary and one-sided ways of regarding crime, in which the classical school sees nothing but the "fiat" of the human will, while sentimental socialism looks at it as the exclusive product of the social environment. The latter imputes to the present "bourgeoise society" all the voluntary evil influences, which the former charges to the mathematical point of individual free will.[3]

§ 135. Ratio of Productivity of Different Factors in Crime.

The second observation is: If the three classes of criminal factors always concur in the determination of crime, their productive force is different, not so much in the absolute sense as relatively, varying in the various categories of delinquents. If it

who attribute an exclusive influence to social factors in "l'Ethnographie criminelle" (Paris, 1894), pp. 47, 48.

[1] Such seems to be the cause of the contradiction which I have noted in the latest writings of Tarde, pp. 185, 186.

[2] *Secchi*, "L'unità della forza fisica" (Rome, 1864), Introd.

[3] *Ferri*, "Socialismo e criminalità."

should be asked whether absolutely speaking the anthropological factors are more effective than the physical or social factors, the problem is insoluble, because badly stated. It would be the same as asking which, air or heart, contributed most to the life of a mammal, since if one or the other fails the combined effect disappears.[1] If, however, we consider the different categories of delinquents, we may say that while physical factors exert an almost equal action on all, the anthropological factors prevail in the criminal-born, in the insane, or criminals by passion, and social factors control in the case of occasional criminals or of those by acquired habit. This shows, as I have said, the positive aspect of the problem of statistics on the movement of crime, which I explicitly put in my "Studi sulla criminalità in Francia." When we watch the movement of crime for a fixed series of years in a given country with a general rhythm of increase and decrease, we cannot but think that it depends on analogous, constant, and accumulated variations of anthropological and physical factors. In fact, while the absolute figures of criminality are far from presenting the stability, so much exaggerated by Quételet, yet the proportional figures for anthropological factors, considering the part played by differences of age, sex, and civil status, in the movement of crime, offer very slight differences even for long periods. As to the physical factors, if, as I have elsewhere remarked, we may explain the sharp oscillations which some of them undergo at determined epochs, it is nevertheless evident that neither climate, the disposition of the soil, atmospheric conditions, the succession of the seasons, nor the annual temperature have in the last fifty years been subject to so considerable and constant changes that they can be even remotely considered in the continual increase of criminality and the ever-rising tide of crime which we have noted in certain European countries. Therefore the social factors, these

[1] We should therefore consider as inexact *Tarde's* observation in "Bribes de statistique Americaine," where he says that the anthropological and physical factors only exercise an impulsive action towards an indeterminate form of activity while the social factors direct that activity and are in consequence the true determinants. All that there is of truth in this idea, I had stated in advance of Tarde in my third edition, *i. e.* that the social medium gives the form to crime which has its basis in the anthropological factor.

We may also say of the observation of a few other writers, to the effect that the social factors tend to predominance as civilization advances over the physical and anthropological, *Fouillée*, "La psychologie du peuple français" (Paris, 1898), p. 22, that this assertion is exact if taken in a relative sense and without pretending to exclude the coaction of biological and telluric factors.

"other causes," as Tarde says, "more or less easy of extirpation but to which sufficient attention is not paid," are responsible for the general advance of criminality, and for this there are other reasons. First: The variations which have been or which can be verified in certain anthropological factors such as the different part played by age and sex in crime and the more or less restricted liberty of explosion permitted to anti-social tendencies, whether congenital or due to mental alienation, themselves depend upon social factors; for example on the institutions for the protection of abandoned children, on child labor, on the participation of women in external and commercial life, on the preventive and repressive precautions taken to isolate dangerous persons and so on. These variations are an indirect effect of these very social factors. Second; Social factors predominate in occasional delinquency and in acquired habitual crime, and as the latter furnish the largest contingent in the total of criminality, it is clear that the social factors contribute the greatest part in the rise and fall of crime in a long period of years. So true is this that, as we shall see, while the gravest misdeeds (particularly against the person, that is those which especially represent congenital crime or are caused by mental alienation) offer a really extraordinary rhythmic regularity with slight increase and decrease, — the general movement of delinquency takes its appearance from the less grave but more numerous offenses against property, persons, and public order, and from those which have rather an occasional character, which are, as it were, microbes of the criminal world and which more directly depend on social environment. If, therefore, social factors play the greatest part in the general increase or decrease of criminality, that is, the factors which can be modified and corrected more easily than the others by legislative action, we see on this point also another obvious benefit of the positive school; since this school, thanks to the data of criminal statistics, has shed light upon the practical side of the criminal problem.[1]

[1] It is remarkable that since the expression of these words which were used already in my 2d edition (1884), *Puglia* should have been able to declare that according to me, "the changes in the social medium have but a very feeble and sometimes insignificant efficacy in the repression of criminal tendencies." Risorgimento e avvenire della scienza criminale," p. 28. It is evident that the criticism is without any justification.

CHAPTER III

PERIODIC MOVEMENT OF CRIME

General data on periodical movement of crime in Europe.

§ 136. The Periodical Movement of Crime.

After these preliminary remarks,[1] we must glance at the general data of the periodical movement of crime in the several countries of Europe, from which I have been able to draw the most complete abstracts of official statistics: these I have summed up in the numerical table and tableau found at the end of the volume.[2] As I have no intention of making any comparative statistics but only of noting the general advance of criminality, this data, not always comparable between one country and another, but homogeneous in each series of the same country, suffices to indicate certain facts, especially with the aid of the diagram. The general phenomenon, which it notes at the first glance, in the countries studied, is the relatively stationary condition of grave crimes and the constant increase of lesser crimes at the same time, especially in the countries where the statistical series are longest as France, England, and Belgium. No doubt this phenomenon is in large part due to the successive accumulation, in cases of petty delinquency, of violations of special laws which in every country have been built up on the primitive foundation of the criminal code; yet it is also, to a certain extent, an indication of a real transformation of criminal activity during the last century. This transformation, substituting fraud for violence, bourgeois offenses against property for the attacks on the person of the Middle Ages, has reached the point where it attenuates the intensity while it at the same time spreads the area of crime. This amounts to saying that the general char-

[1] In the Italian editions I have more fully examined Italian statistics: they are reduced to the same proportions as those of other countries.

[2] For Prussia I have taken the figures given by *Starke*, "Verbrechen und Verbrecher in Preussen," for Russia those of *Tarnowsky*, "La delinquenza et la vita sociale in Russia," in the Riv. Ital. Soc. (July, 1898), and A. A. C. (September, 1898).

acter of the evolution of crime in the last hundred years consists, in part, in the progressive substitution of forms of fraudulent for forms of violent crimes; and, in part, in the decrease or stationary position of natural crime in comparison with the increase, — whether real (by real growth) or formal (by multiplication of special prohibitive laws) — which has occurred in legal delinquency of a conventional character. Another thing that is common to the countries studied is in that which is called high criminality ("haute criminalité," — felony) while the serious attempts against property show a noteworthy decrease (in France, England, Belgium, Germany, and Ireland). On the contrary the serious attempts against the person show a more constant advance or remain stationary as in France and Belgium, or become more numerous, as in England and Germany where they have increased to an even greater degree. If this phenomenon, however, does correspond in the case of crimes against persons to real conditions of criminal activity and at the same time to the increase of population, — on the contrary, for crimes against property (not to mention the real transformation of violent crimes into tricky and fraudulent offenses occasioned by the considerable augmentation of moveable property), it is for the greater part only the apparent effect of an artificial displacement of judicial jurisdiction due to what is called the "correctionalization" of crimes.

§ 137. Crime as Denounced.

Let us now reach a summary view of the principal data furnished by criminal statistics of each country. It should be premised that in order to determine the physiognomy of the progress of crime, the first and characteristic data is to be sought in the lines of the crimes brought into the district attorney's office. In reality, the lines of individuals condemned by varying degrees of jurisdiction, although they represent surer judicial data, have a less exact and less unquestioned value in a statistical sense. This is not because the number of persons tried and convicted (legal crime) does not represent all the crimes committed (real crime) or denounced (apparent crime) in the year in which they are tried. It is principally because this number is exposed to disturbing influences which may change its relation to actual criminality: while the latter is much closer related and much more dependent, in the annual periods and in the effective number, on

the condition of apparent or denounced crime. It is true that in the figures of denounced crimes there may enter as a disturbing element a greater or a lesser tendency of the population to denounce criminal acts or acts believed to be such. Even if this tendency varies much in different nations and thus adds to the difficulty of international comparisons, especially in some crimes — it is nevertheless evident that in the same country it varies less from year to year than the activity and competence of the courts.[1]

§ 138. Periodical Growth of Crime.

Now two conclusions which are evident spring from an examination of the proportional figures for the general growth of crime in Italy. This criminality — until 1890 presenting a symmetrical arrangement of quite regular periodic oscillations around a maximum, determined in 1880, — has continuously undergone a very considerable growth since 1890. This almost symmetrical rise and fall of Italian criminality with its period of about five years certainly does not indicate a constant law of periodical rhythm (in evidence of this it did not continue during the last five years); but still considering it as mere empirical and transitory data it is none the less interesting since it serves as an explanatory criterion of the second and more essential conclusion on the periodical movement of crime in Italy. It is even more interesting, in my opinion, because of the interpretation of which it is susceptible. There is an approximately constant law which we note in the crime of all countries whereby there is an alternation in the annual movement of crimes against property with the movement of those against the person: as the one increases — the other decreases. This is because the most efficient and most variable general factors (abundance of food and mildness of climate) which decrease attempts against property increase the number of violent and sexual crimes: Attacks on property being much more numerous than crimes against the person contribute more in fixing the level of annual delinquency.[2]

[1] See *Ferri*, "Studi sulla criminalità in Francia," in the volume "La negazione del libero arbitrio ed altri saggi" (Turin, 1900).

[2] *Ferri*, "Das Verbrechen in seiner Abhängigkeit von dem jährlichen Temperaturwechsel" (Berlin, 1882); "Variations thermométriques et criminalité," in the volume of essays, "Saggi" (Turin, 1900). One can understand that this statistical law of opposite movements in crimes against property and crimes against the person in consequence of abundance of crops and of annual temperature is not an absolute eternal law; it, like all of the laws of statistics and sociology, is

Thus, before and after 1880, the chief and principal causes were the periods of abundance or of economic crises and of annual variations of temperature, which are grouped about the coldest winter and the agricultural crisis (indicated by the highest price of wheat) which occurred in 1880. In the following years we observe that there was a mild mean temperature and abundant harvests; only to find again in 1886, and for several years, severer winters and an acute economic crisis.[1]

§ 139. Permanent Increase in Crime.

The tendency or general direction of these particular oscillations (which in 1892 seemed to move towards the increase rather than the decrease of crime) has effectively been fixed in the last ten years in the direction of a constant increase. We can demonstrate, and with convincing evidence in the longer series, that in the periodical movement of crime in every country of Europe, distinction should be made between more or less prolonged particular oscillations of increase or decrease and the permanent direction of the general movement. The former depends on the annual disturbances of a particular factor, more controlling and more variable in the most numerous crimes, for example, success or failure of the crops, annual variations of temperature, and industrial or political crises (thus, the amnesties of 1876, 1878, 1893, 1895, etc., influenced the number of convicts in prison). The others are determined (eliminating the purely artificial class of new infractions created by new statutes) by the fundamental conditions, either physical or social, of every country, since, in the general lines of crime in every country, the artificial factors of judicial activity and legislative innovation act concurrently with natural factors. This is exactly why there

merely relative to the epoch when observed and, hence, to the existing civilization. In a more advanced phase of civilization where every man will be assured really human conditions of life and where the sharp alternative of extreme misery and relative comfort will be suppressed, this very increase of attacks on life and virtue which are now almost always in compensation with the decrease of attacks on property, can itself be suppressed. I have never given any other effect, either theoretical or practical, to this law of statistics.

[1] Of this see the clear proofs in *Rossi*, "Influenza della temperatura e dell' alimentazione nel movimento della criminalità italiana," A. P. (1885), p. 501 (with a chart), and "Actes du premier congrès d'anthropologie criminelle" (Rome, (1886), p. 296, and in *Fornasari*, "La criminalità e le vicende economiche d'Italia dal 1873 al 1890" (Turin, 1894). The procurators in their inaugural addresses indicate these causes. See *Ferri*, "Relatione sui discorsi inaugurali," in the "Atti della commissione statistica giudiziale" (Rome, 1886), pp. 224 *et seq.*

was so much discussion in Italy a few years ago on the question of the definition of crime. A further reason is that, especially on this point, the question has a range not merely theoretical but practical and controversial in the domain of science and politics.

§ 140. Increase of Crime; Classicism and Positivism.

In the debates between the classical and positive schools, credit has frequently been given to the classical school and its doctrinism for the increase of crime and for what Holtzendorff called "the bankruptcy of the penal system hither applied." In turn, the classical criminalists have tried to deny this increase and bankruptcy in order to avoid judgment of the social utility of their abstract theories by their effects. In the political domain where the prejudice still rules that the life of society in its groundlines depends rather upon the artificial action of such or such a government than upon its natural factors, which for the great part are foreign and superior to such artificial action, — the increase of crime has often been asserted or denied according to the inspiration of official optimism or of the pessimism of the opposition.[1] Hence, it was only in 1889 when the fact could be no longer dissimulated that there was an official recognition in Italy of the increase of crime. I had been right in maintaining from the beginning that the diminutions observed from 1881 to 1884 could not be taken as indicative of the amelioration of Italian criminality since it was only the extraordinary recrudescence of 1880 which made the less deplorable situation of the following years appear good. Of course, in a high fever a drop of a single degree of temperature is encouraging; yet it was an illusion to accept mere annual and transitory oscillations as a general and constant tendency. A glance at a few of the longer

[1] It is curious to observe how every once in a while such discussions are renewed in all countries. Thus, in France after 1840, there was much controversy on whether there had been increase or decrease of delinquency since 1826. There were optimists like Dufau, Bérenger, Berryat, Legoyt, who argued a decrease, and there were the so-called pessimists, but who were really unbiased observers, and these maintained that there was an increase. Of these were Metz, Dupin, Chassan, Mesnard, and *Fayet* who cites them in his essays, "Sur les progrès de la criminalité en France," in the "Journal des économistes" (January, 1846).

For Italy in 1864, see the same discussion cited by *Carrara*, "Opuscoli" Vol. 425.

In like manner a few years ago there was much discussion of crime in England, which as we shall presently see, tended to decrease. So also in Germany, where it continued to increase. See *Bosco*, "La delinquenza in alcuni Stati d'Europa," pp. 56–115.

series (for example, of delicts in France, England, and Belgium, of crimes and delicts in Prussia) suffices to show that the descending oscillations, even when persistent for several consecutive years, do not prevent the ascending oscillations from beginning again in the following years, in spite of the illusory expectation of a lasting improvement, so often expressed, in their annual reports, by the ministers of justice on the very occasions of these passing oscillations. I shall not urge the very forcible indication of an inverse tendency to the increase of crime which is given by the higher definite figure of imprisoned convicts in Italy, nor shall I insist upon that other painful symptom common to Italy and other European countries, which is the constant proportional increase of delinquents who are under age. Only too soon have the facts come to my support, with the incessant increase from 1886 to 1897 not only in denounced offenses, but in crimes brought to trial.[1]

If we take a look at the other European states we have the following comparative figures:

§ 141. Comparative Tables.

1826–28 to 1893–95

France	Causes tried as contraventions, — police regulations	from 100 to 398	in 70 years
	Delicts	from 100 to 418	
	Crimes against the person	from 100 to 93	
	Crimes against property	from 100 to 32	
Belgium	Persons tried by tribunals for correctionalized crimes against the person	from 100 to 109	in 36 years
	Persons tried by tribunals for correctionalized crimes against property	from 100 to 162	

1840–42 to 1893–95

Belgium	Persons tried by tribunals for delicts	from 100 to 310	in 56 years
	Persons tried by Assizes for crimes against the person	from 100 to 75	
	Persons tried by Assizes for crimes against property	from 100 to 19	

[1] For the sole purpose that the reader may smile at the courtesy and intelligence of some of the adversaries of the positive school, I borrow from the "Revista penale" (Dec., 1884), p. 503 (and moreover it continues its criticisms with the same courtesy if with little seriousness at bottom), the following passage relative to the statistics of Italian crime for the period from 1879 to 1893; "And now that the néo-alchemists of penal science have doted on the famous 'rising tide of Italian criminality,' on the frightful increase of crimes in Italy. And to think that certain statistical assertions of the self-styled positive school were based on such statistical inductions! May these incurable pessimists find here a lesson and make more serious inquiries before pursuing their atavistic lucubrations."

		1857–59 to 1893–95	
England	Persons tried "summarily" for delicts and contraventions	from 100 to 176	in 30 years
		1835–37 to 1893–95	
	Persons tried as criminals for crimes against the person	from 100 to 141	in 61 years
	Persons tried as criminals for crimes against property and against the currency	from 100 to 52	
		1864–66 to 1893–95	
Ireland	Persons tried "summarily" for delicts and contraventions	from 100 to 87	in 32 years
	Persons tried as criminals for crimes against the person	from 100 to 50	
	Persons tried as criminals for crimes against property and against the currency	from 100 to 52	
		1854–56 to 1876–78	
Prussia	Prosecutions for contraventions and thefts of wood	from 100 to 132	in 25 years
	Prosecutions for crimes and delicts	from 100 to 134	
		1881–84 to 1891–93	
Germany	Persons sentenced for crimes and delicts against public order	from 100 to 126	in 12 years
	Persons sentenced for crimes and delicts against the person	from 100 to 139	
	Persons sentenced for crimes and delicts against property	from 100 to 112	

Crimes of public officers are not included: these averaged 1620 convictions per year from 1882 to 1886, and 1535 convictions from 1889 to 1893.

		1867–69 to 1893–95	
Cis-Leithan Austria	Persons convicted of crime	from 100 to 116	in 29 years
	Persons convicted of delicts	from 100 to 620	
		1874–76 to 1891–95	
	Persons convicted of contraventions, from 100 to 173 in 22 years		

		1874 to 1894	
Russia [1]	Persons convicted of crimes against the person	from 100 to 245	in 11 years
	Persons convicted of crimes against property	from 100 to 73	
	Persons convicted of other delicts	from 100 to 152	

[1] For the thirty-three jurisdictions embraced in the Courts of Appeals of St. Petersburg, Moscow, Kazan, Saratov, Karkov, Odessa with about sixty-seven million inhabitants. This data has only an approximate value as showing the criminality of the thirty-three governments comprised. As *Tarnowsky* observes, Riv. Ital. Soc. (July, 1898), pp. 487 and 493, aside from the law of 1882 which transferred burglary in uninhabited houses from the ordinary courts and tribunals to the peace magistrates, the figures of the convictions of the peace magistrates do not include all the cases tried before them. There is missing also all the decisions of the local tribunals of peasants; and, indeed, the rural population in Russia forms

		1883–85 to 1891–93	
Spain [1]	Persons tried for delicts	from 100 to 98	in 11 years
	Persons tried for contraventions	from 100 to 114	

§ 142. Increase in Contraventions and Increase in More Serious Crimes.

The most constant general phenomenon shown by this data is always the very noticeable increase of the petty legal or contraventional delinquency, together with stationary condition or slighter increase of the more serious natural criminality (against the person). In the crimes against property there is either a great decrease (as in France, Belgium, England, and Russia) or a lesser increase (as in Germany).[2] It is, however, necessary to distinguish, in this constant fact, the simple appearance from what truly corresponds with reality. On one hand the decrease of serious crimes against property is due merely to a change of jurisdiction, or, that is to say, to the correctionalization of crimes. Here the usual practice of magistrates (as in France and Italy prior to 1890) or the law itself (as in England in 1856 and 1879 — in Belgium in 1838 and 1849 — in Italy through the dispositions made for the application of the Code of 1890 which have singularly restricted the functions of juries — in Russia through the laws of 1882 on burglary of uninhabited houses) substitute for the aleatory outcome of jury sentences, punishments less harsh but more certain, imposed by the judges of the ordinary tribunals. In crimes against the person, which are less susceptible of correctionalization, we do not find the movement towards diminution very notable. In Belgium the continual increase of correctionalized crimes bears for the most part on crimes against property. Likewise in the great increase in the trivial legal delicts (not to mention the number of police agents which has also increased) a large part is attributable simply to the creation of new delicts and contraventions by one law after another. Thus (and I cannot dwell on the proofs in detail), in France the

about eighty per cent. of the total population. On criminality in Russia, see also *Bosco*, "La statistica giudica e l'instituto internazionale di stato a Pietroburgo," § III, in the "Atti de commissione della statistica giudizia" (Rome, 1898. Sess. December, 1897), p. 270; *Orchansky*, "Les criminels russes et la théorie de Lombroso," in the A. P. (1898), p. 14.

[1] For Spain the statistics of 1894 are evidently erroneous and the later are unworthy of confidence; hence I stopped at 1893.

[2] On the increase of crime in Germany, see an article by *von Mayr* in the "Allgemeine Zeitung," Supplement (February, 1895), and "Revue pénitentiaire" (1895), p. 436; *Beunecke*, "Statistik," in the Z. G. S. (1897), XVII, 737.

law of 1832 on violations of surveillance, the law of 1844 on delicts relative to railways, the law of 1849 relative to the expulsion of foreign refugees, the law of 1873 on drunkenness, the law of 1874 on the conscription of horses: in Germany, the laws for the protection of workmen, laws relative to repose on holidays, etc., have contributed for record new contraventions and delicts. It is true, as Joly [1] remarks, that other laws since 1825 have suppressed other crimes or have reduced the number of cases through less rigorous provisions; yet it is evident that the new delicts give a much more considerable total than that of the few delicts which have been suppressed or diminished. And hence it cannot be denied (as Joly does deny) that in the total increase of French criminality, the artificial element due to new judicial provisions enters. Nevertheless, in certain categories of the most frequent misdeeds, such as robbery, criminal and felonious assaults, a great intrinsic increase in France has really occurred in the last sixty years. Also in England the increase of delicts summarily tried by reason of the law of 1856 (to which corresponds the decrease in crime against property) is largely due, as Levy says,[2] to the new violations introduced by a mass of local laws, especially the Education Act of 1873, against which more than forty thousand infractions were recorded in 1878, more than sixty-five thousand in 1886, and more than sixty-two thousand in 1894. Relative to this lesser delinquency in England (which is so numerous because it also includes violations similar to the "contraventions" of the Italian, French, Belgian, Austrian, Prussian, and Spanish systems and this number is very considerable) it should be clearly noted that the increase of seventy-six per cent. in thirty years is due less to real and serious crimes than to trivial transgressions. This indicates a distinct difference between the advance of crime in England and its progress in Continental Europe.

If we analyse the total of offenses in England in which there were summary trials, we find that the greatest increase occurs in the violations of laws against drunkenness (82,196 in 1861, 189,697 in 1882, 183,221 in 1885, 165,139 in 1886) and in violations of local laws, — while real delicts against the person (assaults) and against property (stealing, larceny, malicious offenses) do not show so important an increment. On the contrary, in

[1] *Joly*, "La France criminelle," p. 13.

[2] *Levi*, "A Survey of Indictable and Summary Jurisdictional Offenses," in "Journal of Statistics of Sociology" (September, 1880), p. 424.

France true delicts from blows and wounds, or robbery, show a greater increase, without regard to legislative innovations. Consulting the statistical abstracts such as I have at present, we find:

TABLE

		1861–63 to 1879–81
England	Persons tried "summarily" for assaults	from 100 to 102
	For stealing, larceny, malicious offenses	from 100 to 110
France	Affairs tried by the tribunals for blows and voluntary woundings	from 100 to 134
	For larceny	from 100 to 116
		1874–78 to 1889–93
England	Persons tried "summarily" for assaults (blows and wounds)	from 100 to 79
	For larceny	from 100 to 116
		1871–75 to 1888–92
	Individuals tried by the correctional tribunals, for wounds and voluntary blows	from 100 to 138
	For larceny	from 100 to 121

In accordance with the summaries given above, England would seem to show a decrease not only in the total of lesser delinquencies and more especially in the lesser delicts against the person but also a slighter increase in delicts against property than is found in France and the other continental countries.[1] This fact,

[1] An exception should be made of the Canton of Geneva, where also, thanks to the influence of many works of social preservation (especially for abandoned children), crime is diminishing. See *Guénoud*, "La criminalité à Genève au XIX^{e} siècle" (Geneva, 1891), pp. 34 *et seq.*

To the decrease of crime in England, which Morrison (who does not distinguish between natural and legal crime) declares is neither so certain nor so general as others have claimed (and I had pointed it out already in my 3d edition in noting as well the increase of the graver offenses against the person, although it did not correspond with the increase in population), the attention of statisticians and sociologists has recently been turned. See *Morrison*, "Crime and its Causes," Chap. I; "Preface to the Criminal Sociology of E. Ferri" (London, 1895), pp. 6–7; "Lavoro e criminalità in Inghilterra," S. P. (15 Jan. 1893), p. 43; "Delinquenti e carceri in Inghilterra," *id.* (July, 1895), where Morrison finally makes distinction between slight criminality and serious crime.

Grosvenor, "Statistics of the Abatement of Crime in England," J. S. S. (September, 1890); *Griffiths*, "La lutte contre le crime en Angleterre," in the "Rev. pénit." (May, 1893); *Fornasari*, "La criminalità e la vicende economiche in Italia" (Turin, 1894), Chap. IV; *Joly*, "La diminution du crime en Angleterre," in the "Revue de Paris" (December, 1894); *Troup*, "Introduction to Criminal Statistics for 1883 (which inaugurated a new series of judicial statistics), (London, 1895), pp. 71 *et seq.*; *Tarde*, "La diminution du crime en Angleterre," A. A. C. (March, 1895); *Aschrott*, "Strafen und Gefängnisswesen in England während des letzten Jahrzehnts," Z. G. S. (1896), p. 1; *Bruni*, "La diminuzione del delitto in Inghilterra,"

ever bearing in mind the increase of the more serious crimes against the person in England (contemporaneous with the great increase of population which has more than doubled in sixty-three years), tends to prove the beneficent power of English institutions against certain social factors of crime — abandoned infancy, pauperism, etc., — and particularly of the improvement in the condition of the laboring classes,[1] in spite of the development of economic activity, which certainly has not been less in England than in France or other European countries. All of this confirms our point of view on the factors of criminality and on the proper measures of social preservation, even in the existing economic phase of society and is contrary to Poletti's theory. The ascending movement of crime is a phenomenon shared by America also. An increase from one hundred to one hundred and twenty-eight in general crime has been observed in Mexico from 1871 to 1885, and in Brazil, at Buenos Aires, and in the United States. Although in the latter country it is difficult to obtain complete annual data which are reliable, there was, according to White, one convict for every one thousand three hundred and forty-two inhabitants in 1850; one for every one thousand six hundred and forty-seven in 1860; one for every one thousand one hundred and seventy-one in 1870; one for every eight hundred and fifty-five

A. P. (1896), p. 166; *Ferrero*, "Le cronache di Newgate e la criminalità in Inghilterra," *id.* (1897), p. 193; *Bodio*, "Sul movimento della delinquenza in Italia e conferenci internazionale," A. C. S. G. (Rome, 1898; Session of May, 1897), p. 195; 1897, p. 203; 1895 (1st Session), p. 231; *Rostand*, "Pourquoi la criminalité monte en France et baisse en Angleterre"; *Tarnowsky*, "La diminuzione della criminalità in Inghilterra," in the "Giorn. del Min. di giust. Russo" (October, 1897); *Goldschmidt*, "Statistique criminale anglaise pour 1896," in the "Rev. pénit." (Aug., 1898), p. 1134. As to France we observe, also, that in 1895 there was a decrease in both crimes and delicts. But, unfortunately, I do not think that this annual oscillation any more than those of 1850–59–60, 1869, 1877–78, 1882 and 1893 (and similar transitory years are found in the statistical series of every country) permit us to affirm that there has been an actual decrease of crime as the Minister of Justice ("garde des Sceaux") seems to believe in his "Rapport sur la Statistique criminelle en 1895," "Journal officiel" (Paris, 9 Nov., 1897), and as others think, among whom are: *Bérard*, "La criminalité en France en 1895," in the A. A. C. (1898); *Crémieux*, "Administration de la justice criminelle en 1895," in the "Revue pénitentiaire" (Dec. 1897, p. 1358); *Yvernès*, "La diminution de la criminalité en France," in the "Journal Société Savante" (Paris, May, 1898), p. 152.

[1] Following *Tugan-Baronowsky*, "Die sozialen Wirkungen der Handelskrisen in England," in the "Archiv für soziale Gesetzgebung und Statistik" (1898), p. 19, *Bosco*, "La delinquenza in alcuni Stati d'Europa," § IV, rightly infers and proves from statistics that the controlling influence in the decrease of English crime should be attributed to the better living conditions (material and, hence, moral) of the most numerous classes.

in 1880; and one for every seven hundred and fifty-seven in 1890. However, it appears that in about one-half of the area of the United States (according to the last census) it increased, while in the other half it decreased, particularly in relation to the increase of population. The same fact occurred in certain parts of Australia, as in New South Wales.

§ 143. Increase of Population a Factor in the Increase of Crime.

The essential rule in the increase of delinquency, both legal and natural, observable in continental Europe, belongs to different causes from those which we have just mentioned and which are mere statistical appearances. Abstracting the different conditions of social environment, the most general and constant cause is the increase of population. Using the figures collected in the Introduction to the volume of 1883 on the movement of civil status in Italy, reproduced by Levasseur [1] and supplemented by more recent data, we find for the periods corresponding to those of criminality, the following proportional increases of population in the various countries (with the exception of Ireland, which on account of heavy emigration shows a decrease):

TABLE

Italy	from 1873 (27,165,553)	to 1894 (30,818,248)	increase	40 %
France	from 1826 (31,858,937)	to 1894 (38,380,000)	increase	20 %
Belgium	from 1840 (4,072,619)	to 1894 (6,341,958)	increase	57 %
Prussia	from 1852 (21,046,984)	to 1878 (26,614,428)	increase	26 %
Germany	from 1882 (45,717,000)	to 1893 (50,778,000)	increase	10 %
England	from 1831 (13,896,797)	to 1894 (30,060,763)	increase	117 %
England	from 1861 (20,066,224)	to 1894 (30,060,763)	increase	50 %
Ireland	from 1861 (5,798,967)	to 1894 (4,600,599)	decrease	20 %
Cis-Leithan, Austria	from 1869 (20,217,531)	to 1894 (24,649,193)	increase	21 %
Spain	from 1883 (17,158,672)	to 1892 (17,938,151)	increase	4 %

This increase of population is a natural and inherent cause of the increase of crime by increasing the number of relations, of things, and of persons in a denser population on the same territory and especially in urban centers. It should not be forgotten, however, that in the first place the increase of population only operates as a cause for the increase of crime when not neutralized wholly or partially by other influences, especially social, which anticipate

[1] *Levasseur*, "Statistique de la superficie et de la population des contrées de la terre," I part, B. I. I. S. (Rome, 1886), 1, 3; "Movimento della populazione in alcuni Stati d'Europa e d'America," *id.* (Rome), X 1, p. 1.

or moderate crime. An example is England, where it seems that the increase of population is accompanied by an increase of crime, not when there is a normal increase of the population living on a definite area, but when the number of inhabitants suddenly increases through some rapid change in economic conditions (forms of labor) in a given territory. In the second place, as Rossi says,[1] we fall into inaccuracies when we are content to compare the percentage of increase of population with that of the increase of criminality. This is what Bodio does in his report on Italian delinquency from 1873 to 1883, when he concludes that in those eleven years, since population grew seven and a half per cent., "crime might have grown seven and a half per cent. in the same period without on that account being able to say that it had actually increased." [2] As the increase of population in Italy is solely due to the excess of births over deaths (emigration being much greater than immigration) births augment population by a contingent which adds nothing to crime, at least actively, in the first ten or fifteen years, while death removes individuals of all ages, and mostly those of the age when man can commit and in fact does commit crime.[3] It is impossible here to enter into a detailed study of other countries and I shall content myself with noting a few significant facts shown by the graphical chart. We see there, for example, the same influence of the great famine of 1846–1847 on crimes against property in France and Belgium; the sharp oscillations of crime in Ireland reflecting the politico-social agitations in that country; the analogy in the progress of crime in France and Prussia where the period of ten years' calm preceding the war of 1870–1871 (remarkable in both countries by an extraordinary decrease of statistical records), was succeeded by a period of considerable and continuous increase of

[1] *Rossi*, "Le recenti statistiche giudiziarie penali italiane," A. P. (1889), X, 293.

[2] *Bodio*, A. C. S. G. (Rome, 1886), p. 32, and to the same effect in subsequent annual reports.

[3] An application of this idea has been made by *Mayr*, "Rapporto della criminalità colla composizione della popolazione in Germania," in the A. Z. (Suppl., Dec., 1895). He maintains that the increase of crime in Germany after 1888 was due to the increase of births, which occurred regularly after the war of 1870, and, hence, to the greater number of minors of eighteen or more who were active in life from 1888 on. See "Rev. pénit." (1898), p. 142. The increase of crime in Germany is, however, more the reflex of economic conditions, either from more acute crises increased congestion, greater number of women and children in industry, and the consequent direct or indirect degeneracy which is its inevitable effect. See *Bosco*, "La delinquenza in alcuni Stati d'Europa," § 5.

crimes which proceeded from the reaction of an unfavorable economic condition and an acute crisis, the effects of which are shown, for example, in France, Germany, and Italy, by an increased death rate. These facts in their salient lines demonstrate how closely crime depends on the entirety of its multiple factors. And now putting aside the detailed studies on some of the social factors of delinquency which are susceptible of a statistical expression and of which I have made exposition in my "Studi sulla criminalità in Francia," such as the increase of police agents, the abundance or scarcity of the harvests of cereals and of wine, the progress of alcoholism, family relations, the increase of moveable property, the growth of civil justice, commercial and industrial crises, the rate of wages, the annual improvement in the general conditions of living and the like, in spite of the great spread of education and of institutions of providence and charity — we must leave these general data of criminal statistics in order to draw from them by induction some theoretical and practical conclusions of criminal sociology.

CHAPTER IV

LAW OF CRIMINAL SATURATION

Law of criminal saturation. Slight efficiency of punishment; historical, statistical, and psychological proofs.

§ 144. Law of Criminal Saturation.

THESE general summaries show how crime, whether natural or legal, continues to increase in the aggregate with more or less of an annual variation which tends to accumulate, in a long period, into a series of real criminal waves. From this we see that the level of crime each year is determined by the different conditions of the physical and social environment combined with the congenital tendencies and accidental impulses of individuals, in accordance with a law, which, in analogy to the law of chemistry, I have called the law of criminal saturation. As a given volume of water at a definite temperature will dissolve a fixed quantity of chemical substance and not an atom more or less; so in a given social environment with definite individual and physical conditions, a fixed number of delicts, no more and no less, can be committed.[1]

§ 145. Annual Criminal Variations.

Our ignorance of a multitude of physical and psychical laws and of numberless concurrent circumstances of fact prevents us from forecasting with precision the level of criminality; yet it is none the less the necessary and inevitable effect of a given physical and social environment. Statistics prove that the variations of this environment are always accompanied by relative and proportionate variations in criminality. In France, for example (and this observation applies to every country which has a long

[1] This law of social saturation has recently been applied by Durkheim to the phenomenon of suicide of which he writes: "Every society has, at every moment of its history, a definite aptitude for suicide. The relative intensity of this aptitude is measured by taking the ratio between the total number of voluntary deaths and the population of both sexes and all ages. We shall call this numerical data the death rate by suicide appropriate to the society under observation." *Durkheim*, "Le suicide," p. 10.

series of data), the figures of crimes against the person vary but little in sixty-two years. It is the same in England and in Belgium because the respective environments are more stable, and the congenital dispositions of individuals and the human passions cannot vary so often or so violently, unless there be meteoric or extraordinary social disturbances. I have been able to prove that the greatest variations in crimes against the person in France may be either at times of political revolution or in years when the summers have been hottest and when there has been the greatest consumption of meat, cereals, and wine, for example in the years of the great criminal increase of 1849–1852.[1] For lesser delicts of a more casual kind against the person I have demonstrated that assaults, for example, follow particularly in their annual oscillations the greater or lesser yield of the vintage, and also that in their monthly variations they show an increase in the months nearest the harvest, in spite of the constant decrease of other crimes against the person after the month of June. On the other hand, the statistics of crimes against property, and especially of simple delicts, show strong oscillations by reason of the lesser stability of their special medium, that is, the economic situation, which is always, so to speak, in a state of unstable equilibrium, as in years of famine and poor crops, commercial, financial, and industrial crises, etc. The influence of the physical medium also makes itself felt; for I have proven elsewhere that crimes against property show sudden increases in years when the winter is severe and corresponding decreases in years when the temperature is milder.[2] This correspondence between the most general, powerful, and variable of the physical and social factors of crime and the most characteristic manifestations of crime, such as robberies, assaults, and rapes, is so close

[1] *Ferri*, "Socialismo e criminalità," Chap. II.

[2] "Das Verbrechen in seiner Abhängigkeit von dem jährlichen Temperaturwechsel"; "Variations thermométriques et criminalité." As to the influence of harvests and of the price of cereals on crimes against property, we should call attention (besides the well-known chart of *Mayr*, "Rapporto della criminalità colla compozione della popolazion in Germania," p. 557) to a diagram by *Mayhew and de Binky*, "The Criminal Prisons of London" (London, 1863), p. 451, which compares the annual price of wheat and the number of delinquents in proportion to population from 1834 to 1849. A study of the principal categories of crime has been made from the same point of view from 1870 to 1886 by *Fuld*, "Der Einfluss der Lebensmittelpreise auf die Bewegung der strafbaren Handlungen" (Mayence, 1881), and by *Rossi* for Italy from 1875 to 1883, A. P. (1885), p. 501, and more fully by *Fornasari*, "La criminalità e la vicende economiche in Italia dal 1873 al 1890."

and constant that in my researches on criminality in France, covering fifty years, whenever I found some exceptional oscillation in these delicts, I foresaw at once that in the history of the same year there would be, for example, an agricultural or financial crisis or a political revolution, and, in the meteorological statistics, a colder winter, a hotter summer, and the like. With nothing but the plain line of a diagram of criminal statistics, I was able to reconstruct in their most salient traits the historical vicissitudes of a whole country, thus confirming the actuality of these laws of criminal saturation by psychological experiment.

§ 146. Reflex and Complementary Crime.

Further, it may be said that, as in chemistry, an exceptional supersaturation may occur through an increase of temperature of the solvent liquid, so, also, in criminal sociology, beyond the regular and constant saturation, there is observable at times an actual criminal supersaturation due to extraordinary conditions of the social environment. It should be observed first of all that the principal and typical delinquency has its reflex delinquency, since the increase of the graver or more frequent crimes of itself involves, as a natural consequence, a greater number of riots and outrages against public officers, and a greater number of perjuries, wrongs, violations of surveillance, and escapes. Add to this that certain crimes have complementary crimes which at first are the consequences of crime but in their turn become new stimulants of the crimes from which they result. Thus, when thefts are numerous more stolen property is bought, received, or hidden; when there are more homicides and assaults there is increased carrying of concealed weapons. When there are more adulteries, there are more insults and duels, and vice versa.

§ 147. Criminal Supersaturation.

There is also, in an exceptional and transitory way, actual criminal supersaturation, properly speaking. Ireland and Russia afford conspicuous examples, but the same fact occurs in all countries, especially in America during the periods of election. In France, in the period preceding and following the Coup d'État of 1851, the crime of concealing delinquents, which in every other four-year period from 1826 to 1881 did not exceed fifty, rose to the number of two hundred and thirty-nine in the four years (1850 to 1853, incl.). So, also, in Italy we note a remarkable

increase of prosecutions for crimes against the safety of the State and public order in 1898 and 1899, clearly a reflection of the economic, political, and social crises which that country underwent. Once more, in the serious famine of 1847, the crime of stealing grain in France reached the total of forty-two in a single year, while in fifty-five other years, taken all together, it scarcely reached a total of seventy-five. Furthermore, it is a well-known fact that in years when provisions are dear and the winters hard, many thefts and petty crimes are committed in order to obtain food and shelter in prison, — a fact which is often confirmed by the Department of Justice. I have further observed in France that some other crimes against property, on the contrary, decrease in years of famine in consequence of an analogous psychological movement which entrains what may be called a statistical paradox. As the crop pests (ordium, phylloxera) are more effective than the severity of punishment in decreasing the number of assaults, so, too, is famine more effective than the bars or the dogs released in the prison yards in preventing the escape of convicts. In famine years, there are characteristic reductions due to the advantage to the convict in being harbored and fed by the State. A similar fact which gives a new psychological confirmation to our remark is that in 1847, when there was an extraordinary increase of all crimes against property, there was a marked decrease only in crimes of theft and breach of trust committed by servants. This was precisely because if there was anything better than penalties to deter them it was the fear of losing their support by their master during the economic crisis.[1] Chaussinand, confirming my observations, adds that in the face of this crisis there was a notable decrease in the number of resistances to arrest "because thieves and vagabonds then prefer to be arrested in order to avoid the misery which prevails outside the prisons."[2]

§ 148. Criminal Supersaturation and Regularity of Crime.

The law of criminal supersaturation has two principal consequences in its bearing on criminal sociology. The first is the

[1] Here are some of the figures:

France (Court of Assize)	*1844*	*1845*	*1846*	*1847*
Crimes against property	3,767	3,396	3,581	4,235
Breach of trust by servants	136	128	168	104
Thefts by servants	1,001	874	924	896

[2] *Chaussinand*, "Étude sur la statistique criminelle en France" (Lyons, 1881), p. 18.

inaccuracy of speaking of the mechanical regularity of criminal phenomena which (since Quételet) has been much exaggerated. Thousands of times his famous dictum has been cited: "There is one tax which is paid each year more punctually than the others and it is the tax of crime." In consequence, there has developed a general belief in the possibility of calculating in advance how many individuals would steep their hands in the blood of their fellow-men, how many poisoners, how many forgers there would be, because "crimes are annually reproduced in equal number, with the same penalties and in the same proportions." [1] For example we hear it repeated by statisticians, that, from year to year crimes against the person vary at most by a twenty-fifth, and crimes against property, by a fiftieth, [2] or again, that there is a law whereby the variations of delict do not exceed one-tenth.[3] This opinion, which originated with Quételet and the others because they observed only the advance of the most serious crimes and only during a very short series of years, has already been refuted in part by Maury himself, by Rhenisch,[4] and more explicitly by Aberdare,[5] Mayr,[6] and Massedaglia.[7] For, if the level of crime is determined in a necessary manner by physio-psychic conditions of population and by the conditions of the physical and social environment, how can it remain constant and unaltered notwithstanding continual and frequently considerable variations of these very conditions? There will be found a constant ratio between a given population living in a given environment and the number of crimes. This is what I call the law of criminal saturation. For this very reason, the contingent of crime will never be equal from one year to another. There will be as Massedaglia (and after him Poletti) has said, a

[1] *Quételet*, "Du système social" (Paris, 1841), 1, I, § II, Chap. II; "Physique sociale," 2d ed. (Brussels, 1869), 1, IV, § 8. And among others, *Buckle*, "History of Civilization in England," I, p. 23, etc.; *Wagner*, "Die Gesetzmässigkeit in den scheinbar willkürlichen menschlichen Handlungen" (Hamburg, 1864), p. 44.

[2] *Maury*, "Du mouvement moral de la société," R. D. M. (September, 1860).

[3] *Poletti*, "Teoria della tutela penale" (1878), Cap. VI; Appendix to the second edition of *Lombroso's* "L'uomo delinquente."

[4] *Rhenisch*, in the "Zeitschrift für Philosophie und philosophische Kritik," cited by *Block*, "Traité théorique et pratique de statistique," 2d ed., p. 119 (Paris, 1886).

[5] *Aberdare*, "Il delitto e la pena in Inghilterra," R. C. (1876), p. 204.

[6] *Mayr*, "La statistica e la vita sociale," 2d ed. (Turin, 1886), p. 554.

[7] *Messedaglia*, "La statistica della criminalità" (Rome, 1879), p. 44 and *note* 3; and to the same effect, *Minzloff*, "Études sur la criminalité," P. P. (September, December, 1880).

dynamic but not a static regularity. In this sense we may admit the conclusion of Drobisch, that "all regularity shown by moral statistics in arbitrary human acts is not derived from a law of fate, a destiny which exacts blind submission and is accomplished by an irresistible force, but is the product of constant causes which are yet susceptible of modification." [1] This is what we determinists maintain in the following declaration: on the one hand, human phenomena, and hence criminal phenomena, depend on natural causes but not through a necessity of nature, not through fatalism or predestination; on the other hand, it is possible to modify the effects by modifying the very causes. This is conceded by Quételet himself where he says: "If we change the social order, we shall see an immediate variation of the facts which were produced in so constant a manner. Statisticians should find out whether these changes have been useful or harmful. These studies show at all events the importance of the mission of the legislator and his share of responsibility in all the phenomena of the social order." [2]

§ 149. Criminal Supersaturation and Punishment.

The second consequence of this law of criminal saturation (and it is of great theoretical and practical importance) is that it scientifically proves that punishments, in which until now, in spite of a few purely platonic declarations, the best remedies against crime have persistently been seen, have none of the efficacy attributed to them. Delicts increase and decrease through a sum of causes which are very different from the penalties so easily promulgated by legislators and applied by judges and jailors. History affords striking examples of this. In the corrupt society of the Roman Empire it was in vain that laws were enacted to smite "gladio ultore et exquisitis poenis" [3] those guilty of celibacy, adultery, incest, and crimes against nature. Dion Cassius [4] says that in Rome alone as a consequence of the law of Septimus Severus more than three thousand prosecutions for adultery were immediately begun. Something quite different, however, was needful to cure the diseased condition of society,

[1] *Drobisch*, "Moralische Statistik und die menschliche Willensfreiheit."

[2] *Quételet*, "Physique sociale," Book IV, Sec. III, § 8. Hence, *Fuld*, "Einfluss der Kriminalstatistik," in the "Archiv für Strafrechtswissenschaft" (1885), wrongfully reproaches the Italian positive school with following "the old mechanic theories of criminal statistics."

[3] Tit. IX, Lib. IX, Code.

[4] Hist. Rom., LXXVI, 16.

as is proved by the fact that the most drastic laws against the same crimes were reënacted down to the time of Justinian without result. Accordingly the lex Scatenia against infamous carnal crimes, Gibbon [1] tells us, "fell into desuetude with the lapse of years and by reason of the multitude of the guilty." But this example does not teach those who, for instance in France, would combat celibacy with only the fear of penalties. It is a fact that from the Middle Ages down to our days the softening of manners has in large part concurred in making less frequent in Europe the bloody assaults which were formerly numerous enough, in spite of the atrocious penalties of the times. Du Boys [2] chides Celtes for his simplicity, when, after making a chart of the frightful tortures of his time (A.D. 1400–1500) in Germany, he shows astonishment that these tortures failed to prevent the multiplication of crime. Imperial Rome flattered itself that it would stifle Christianity with the most atrocious penalties, but, on the contrary, these tortures seemed to feed its source, which certainly did not fear the rigor of the laws. In like manner Catholic Europe in the Middle Ages thought to extinguish religious reform by persecutions which were increased under the disguise of penal justice. The contrary effect, however, was obtained. If Protestantism has not taken deep root in France, Italy, and Spain, the reasons are ethnic and social, and it is not because of slaughter and massacres. The proof of this is that it has made no greater strides since penalties aimed at religious beliefs have been entirely taken away.[3] The spread of general education has caused the

[1] *Gibbon*, "Decline and Fall of the Roman Empire," Chap. XLIV.

[2] *Du Boys*, "Histoire du droit criminel des peuples modernes" (Paris, 1858), Vol. 2, Lib. III, Chap. XXVI, p. 613. It is enough to recall the vivisection of persons condemned to death in the sixteenth century of which *Andreozzi* has given instances in Tuscany, in his work: "Leggi penali degli antichi Cinesi" (Florence, 1878), pp. 43 *et seq.* Also *Romiti*, "Catalogo ragionato del Museo anatomico di Siena" (Sienna, 1883), Introduction, pp. 8 *et seq.*, and "Ancora sull' anatomia in Siena nel XV secolo," in the "Notizie anatomiche" (Sienna, 1883).

[3] In the light of the doctrine commonly called historical materialism, and which I think more exact to call economic determinism (according to which, moral, juridical, political, and social phenomena in general are determined, directly or indirectly, by the economic conditions of each society at each moment of its evolution), one sees that the irrepressible expansion of the Christian movement, and afterwards of the Protestant Reformation, was determined, for Christianity, by the economic evolution which brought about the decline of servitude and which was, in consequence, an expansive force (superior to all the violence of a sanguinary repression) for a new religion preaching the brotherhood of all men. In the same way, the Reformation movement was but a religious reflection of the economic emancipation of the bourgeois class in central Europe, and had, for the same

disappearance of the crimes of Black Art and Sorcery, notwithstanding that they withstood the most barbarous punishments, both in antiquity and in the Middle Ages. Preceding and following the crusades, the upheaval of economic conditions and the spirit of adventure in Germany in the sixteenth century resulted in an enormous increase in the number of vagabonds. "After the Thirty Years' War, this dreadful crisis was a plague, — a crisis, which suspended, so to speak, all regular life in Germany. In spite of lash, brand, and gibbet, the number of vagabonds swelled every day and an ancient chronicler says there was fear lest the wood should be lacking to build gallows and the hemp to twist ropes." [1] It was in vain that the nose, the tongue, and the lips were cut for blasphemies, everywhere threatened and punished. In France from Louis IX to Louis XV, blasphemies abounded, but now, on the contrary, they steadily diminish in spite of impunity in civilized countries. Yet where coarseness of language persists, the law can do nothing, even when it does not fall into disuse.[2] Mittermayer [3] remarks that, if in England and Scotland there are less false testimonies, less perjuries, less riots and resistances than in Ireland and on the continent of Europe, it is largely due to the difference of national character, which should be the principal element of criminal life by reason of its hereditary and incessant influence both on individuals and on institutions. Even without recourse to statistics, therefore, we know that delicts and penalties move in different spheres, which are excentric, so to speak, to each other. But when statistics in addition come to confirm the teachings of history, there can be no further doubt of the almost complete inadequacy of punishments against crimes.

§ 150. Legislative Repression and the Increase in Crime.

We may look to statistics for a striking proof of this truth by studying the course of repression in France during sixty-six years, as I have studied it in my "Studi," and which I shall complete

reason, an expansive force that could not be overcome by persecutions or condemnations. The same phenomenon is going on under our eyes with respect to socialism which represents the economic emancipation of the proletariat and a higher phase of economic and, hence, of moral and social evolution.

[1] *Reich*, "L'evoluzione penitenziaria in Sassonia," reviewed by *Rivière* in the "Rev. pénit." (1896), p. 609.

[2] As has been seen in Tuscany until 1890 where the penalties of Article 136 were scarcely ever inflicted.

[3] *Mittermayer*, "Traité de la procédure criminelle en Angleterre, en Écosse et dans l'Amerique du Nord" (Paris, 1868), § 4, p. 53.

with the aid of data relating to these last years. When repression of crimes is spoken of, we should first of all distinguish the repression which depends on the general character of the penal legislation, animated by more or less severity, and that which is manifested in the application of the law in the work of judges who, more or less rigorously, fulfill the social function of its administration. As to legislation, it is certainly not to any decrease in the penalties that one may attribute the increase of crime in France. The legislative variations which have occurred in that country, especially in 1832 and 1863, with the revisions of the Penal Code, have introduced only partial moderations of penalties. This was done with the intent (effective according to the annual reports of criminal statistics) of strengthening judicial repression by facilitating the infliction of less excessive punishments, in virtue of the constant psychological law which makes the pronouncing of an excessive sentence repulsive even to judges themselves. It is well known that if there is a Penal Code in Europe which does not sin by excess of indulgence, it is the French, which so strongly retains the severity of the Napoleonic epoch in which it was promulgated; without considering that in certain crimes (such as violations and attempts on chastity which nevertheless show an extraordinary increase in France) the penalties have been increased by successive laws. The same is true of blackmail which becomes more and more frequent, as Joly [1] observes, in spite of the more severe penalties established by the law of 1863.

§ 151. Judicial Repression and the Increase in Crime.

The question, therefore, leads to judicial repression, whose general movement in the last half-century requires consideration, since it is this movement which obviously exerts, in the sphere of the penal system, the most efficacious action on criminality. For laws exert a real action only when applied with more or less rigor, since in the social classes which furnish the largest contingent of crime, the laws are unknown before their practical application. And the truly defensive function, which specially anticipates the repetition of crimes by the same delinquent, depends upon the application of the laws in practice. Hence, criminal sociology concedes little importance to the arguments, which many theoretical jurists base solely on a psychological

[1] *Joly*, "Le crime," p. 122.

error when they suppose that the delinquent classes are interested in the revision of a penal code, just as the least numerous and best educated classes of society might do. It is well in this connection to recall, also, the error of those who, like Garofalo for example, think that the abolition of the death penalty would produce regrettable consequences, not so much in itself but because the delinquent classes would know of it.[1] They fail to perceive that murderers pay no attention to statutes as printed but consider merely whether the judges condemn to death and above all, whether the hangmen can really execute their sentences. Now such a result has not happened in Italy for many years, although capital punishment was provided for in the Code. Experience has now shown once more that criminal phenomena are independent of penal laws; for, we have seen that in Italy the sole crime that has actually decreased in late years is murder, for which the punishment of death was abolished by law in 1890.

§ 152. Severity and Leniency in Judicial Repression.

The greater or lesser severity in judicial repression is the result of two elements: 1st, the number of persons aquitted in proportion to the number of persons charged with crime. 2d, the different proportions of grave penalties compared with the total number of persons sentenced. In fact, in an abstract way, the percentage of acquittals should not indicate more nor less severity in repression, since conviction or acquittal should be nothing but a simple declaration of certainty and hence only reflect the greater or less value of the evidence adduced. In reality it must be conceded that the increase in the percentage of persons convicted is inseparably related to the severity of the judges, especially the ordinary judges who exhibit this severity either in showing themselves less scrupulous in weighing evidence or more disposed to admit aggravating circumstances, and hence the heaviest penalties. An example of this is the extreme rarity of acquittals in trials for resisting arrest. Of these two elements, the first is certainly the more important on account of the psychological law that man in punishment, as in any kind of pain, is restrained more by the certainty than by the gravity. This is why even the classical criminalists have rightly maintained that a mild but certain penalty has greater efficacy than an atrocious punishment, which leaves a chance of escape. It is, nevertheless, true

[1] *Garofalo*, "Contro la corrente" (Naples, 1888).

that they carried this theory to excess in trying to obtain for all crimes without distinction (even for those committed by born and habitual criminals) a moderation and shortening of the continuous and excessive punishments without striving also to obtain a greater certainty through reforms of procedure and judicial regulation.[1] The phenomenon in the proportion of acquittals

[1] Now, to see how these two factors behave in relation to general criminality: I began by dividing, in the case of France, the series 1826–1895 into periods of five years, rejecting the two years 1870–71 as abnormal on account of the war, and ending the ninth period with 1869 and beginning again from 1871, because that year inaugurated a new era of political and social organization and could not be compared from the judicial standpoint with the preceding years.

After the determination, for each period, of the total number of persons tried and acquitted by the Courts of Assizes and by the Correctional Tribunals, I found the following proportions:

France	Proportion of acquittals to every 100 accused		
	Assizes	Correctional Tribunals	Total
I. 1826–30	39	31	43
II. 1831–35	42	28	30
III. 1836–40	35	22	23
IV. 1841–45	32	18	19
V. 1846–50	26	16	17
VI. 1851–55	28	12	13
VII. 1856–60	24	10	7
VIII. 1861–65	24	9	6
IX. 1866–69	23	17	8
X. 1872–76	20	6	6
XI. 1877–81	23	5	6
XII. 1882–86	27	6	6
XIII. 1887–91	29	5	6
XIV. 1892–95	30	5	6

From this table it is clearly evident that there is a continual increase in the proportionate number of acquittals as well in the Assizes (except for the last decades) as for the ordinary Tribunals. This may be due to the fact that the magistrates begin the prosecutions with greater care, but it in any event indicates an incontestable tendency towards greater judicial severity (which nevertheless has not prevented the constant growth of criminality). For this constant decrease in the indulgence of judges, reasons certainly are at hand, — first of all, in the personal tendencies of the judges chosen in different ways and differently disposed; then in the political revolutions which always have as their effect, as Quételet remarks, the temporary weakening of repression only to make it more severe (as is seen in periods V and X after 1848–52 and 1870–71); and finally, in legislative changes. We observe in the figures for the Assizes, for the Tribunals, and in the total a marked decrease for the period III due to the law of 1832, which reduced certain penalties and introduced for the first time general extenuating circumstances (unconscious recognition of the categories of delinquents and thereby easily lending itself to abuse) and aided convictions. On the one hand, the disinclination of judges to

is repeated in a similar phenomenon, which, while it relates to the certainty of evidence and to the discovery of the authors pronounce excessive sentences was obviated; on the other hand, in the presence of a law which reduced penalties, there arose spontaneously in the judges a psychological tendency to offset this moderation by a greater severity; this seems to be reproduced in period VIII, perhaps by an analogous effect of the law of 13 May, 1863 (revision of the Code), and for the Tribunals by reason of the law of 20 May, 1863, on the summary prosecution ("instruction immédiate") of flagrant delicts. Perhaps one may further charge the most striking variations of this table, in the case of the Assizes, to the various laws respecting the jury, — laws which either on account of the number of votes necessary for conviction, or on account of the different ways of selecting the jury, should render acquittals more or less easy, as *Quételet*, "Physique sociale," § 8, Sec. 3, lib. 4; and *Bérenger*, "De la répression pénale," I, 258, make the Minister of Justice ("garde des Sceaux") observe in his report on the statistics for 1848. Thus, for example, in the Assizes, we see that the high figures of acquittals in period I, due in part to the Revolution of 1830, but in greater measure due to the law of 2 May, 1827, which substituted general for restricted jury lists, reaches the maximum in period II, after the law of 4 March, 1831, had increased the number of votes necessary for conviction from 7 to 8: it diminishes, on the contrary, in period III by reason of the law of 9 September, 1835, which restored 7 as the number of votes necessary for conviction. In period V, the number of acquittals increases whether because of the Revolution of 1848 or the decree of 6 March, 1848, which increased the number of votes to 8; this it is true by the decree of 18 October of the same year: and with this latter there coöperated the decree of 7 August of that year, which enlarged the jury lists on the basis of the political electorate and led to the formation of less severe juries since the jury was not preferentially drawn from the social classes which were most interested in and most inclined to rigorous penalties. In like manner, the marked decrease of period VI was brought about, aside from the strictness inspired and imposed by the imperial government, by the law of 4 June, 1853, which restricted the jury lists: and it was probably the same in period X after 1872 in consequence of the establishment of a strict government after the revolution and as a result of the law of 21 November, 1872, which again restricted the jury lists, extended by a prior law of 1871.

These observations, published by me in my "Studi sulla criminalità in Francia dal 1824 al 1878" are found almost literally in the official report of the Minister of Justice at the beginning of the recapitulatory work: "La Justice en France de 1826 à 1880" (Paris, 1882), p. 37.

Tarde in a chapter of "Criminalité comparée," where he sketches a psychological analysis on the "Degré de conviction juridiciaire" required for a conviction, — a degree which changes between juries and judges, between judges and tribunals, — says that he has never seen this question treated by any one, not even by the Italian positivists (p. 124).

I may be permitted to remark that these observations and researches which we have just seen on the annual proportions of acquittals give some indications on that same question and not only from the psychological but also from the sociological point of view. See also *Yvernès*, "Le crime et le criminel devant le jury," J. S. S. (Paris, 1894), pp. 325 *et. seq.*

In my Italian editions I made as full a statistical examination as could be made from the figures for Italy. See the 4th edition, pp. 359–362. We can on that account reach only a negative conclusion which is as follows: a constant and important decrease of repression has not, in our country, responded to the strong oscillations and to the general increase in the number of delicts, which could have shown a direct connection between delinquency and punishment.

of misdeeds, is yet an important element in the effectiveness of punishments in that it is related to that hope of impunity which weakens all penalties and which therefore indicates a greater or lesser efficacy in the ratio which the increase or decrease in the number of undiscovered criminals and criminals released for want of proof bears to the total number of misdeeds denounced and discovered.

§ 153. Unpunished Crimes as a Cause of Increase in Crime.

First of all, there is a whole series of data that statistics cannot in any way verify but which, nevertheless, is of great importance, since it coöperates in enhancing the hope of impunity. This is the number of crimes which are not discovered. However, the influence which this factor possesses to provoke new crimes in spite of the penalties provided in the codes is exclusively exerted on individuals who have already committed crime. When a crime is discovered and the guilty person remains unknown, or when his guilt is not proven, the resulting effect is of infinitely more consequence in paralyzing the efficacy of punishment, since it reaches all who have knowledge of the discovery of the crime. It may be asserted that when it is notorious that a grave crime has been committed and that its author is unknown, this has infinitely greater influence in tempting and provoking persons already predisposed to crime than the knowledge of daily convictions has to deter them. In reality, punishment, whatever you make of it, strikes but a small minority of the delinquents.[1] Even disregarding undiscovered crimes, if one sums up only the denounced crimes of which the authors remain unknown or because of insufficient proof benefit by an "ordonnance de non-lieu" and the number of defendants tried and acquitted for lack

[1] We find the same results for France; and this in studying an even larger period. This shows a growth in the number of unknown perpetrators and a decrease in cases of lack of proof; and, hence, a movement which is in no way proportionate to the almost four-fold number of prosecutions which fail annually. It shows, also, a new confirmation of the absence of causal relation between the efficacy of penal prosecutions and the drift of criminality.

It is strange that *Tarde* in a study on unpunished delicts in the "Essais et mélanges sociologiques" (Lyons, 1895), should have given only the effective figures for delicts of which the criminals remained unknown or have been discharged for lack of sufficient proof, without showing the percentage in relation to the total figures of delicts annually denounced, the total of which is increased in other ways. Had he made these calculations his lamentations would have had no basis in statistics or in facts; and Bosco, usually so discreet, would not so blindly have trusted him. *Bosco*, "La statistica civile penale e l'instituto internationale a Pietroburgo,"

of evidence or by reason of a statute of limitations (prescription) or by the nullity of the penal action (reversal on appeal), and the number of pardons and amnesties, it will be found, as I said in the Commission of Judicial Statistics (and it has been vainly disputed), that sixty-five per cent. of discovered delicts remain unpunished.[1] Since this condition, which in the end paralyzes even the feeble intimidative power of punishment, is constant and inevitable in all countries, let us see whether it has sufficiently dominated in the last decade that we may find in it one of the reasons for the increase of criminality. We note for Italy that the proportion of delinquents and persons discharged for want of sufficient evidence was rather on the decline from 1880 to 1895, while, on the contrary, crime continued to increase. It thus showed that it is, even from this point of view, independent of the greater or lesser efficacy of the prosecutions, because it depends on anthropological, physical, and social factors which, aside from repression, determine its progress each year. Now take up in the case of France the second element of judicial repression, *i. e.*, the proportion of persons sentenced to the heaviest penalties, in relation

pp. 288–289. See also *Tarde*, "Les transformations de l'impunité," A. A. C. (November, 1898).

FRANCE. — *Perpetrators unknown or not sufficient indications.*

Yearly Averages	AFFAIRS SENT TO THE ARCHIVES (by the Trib. publ.) or ending in an "ordonnance de non-lieu" (Cabinet d'Instr.) all prosecutions ended because of	
	Unknown perpetrators	Insufficient proofs
	percentage	percentage
1831–1835	10.7	8.6
1836–1840	10.0	8.1
1841–1845	9.9	7.9
1846–1850	11.1	7.1
1851–1855	11.6	6.9
1856–1860	11.6	6.8
1861–1865	11.8	7.5
1866–1870	12.2	8.2
1871–1875	13.1	7.8
1876–1880	13.3	7.6
1881–1885	14.8	5.8
1886–1890	16.4	5.0
1891–1895	16.8	4.8

[1] A. C. S. (1894), p. 186.

to the total number of convictions. I have kept track, in the Courts of Assize, of the death sentences, and the sentences to hard labor and solitary confinement, since the other persons sentenced are either minors sent to a house of correction or prison with simple correctional penalties, or fine.[1] This stronger

[1] France	Sentenced in the Assizes (After argument)		Sentenced to prison by the Tribunals
	to death	to hard labor or solitary confinement	
	per cent.	per cent.	per cent.
I. 1826–30	2.5	38	61
II. 1831–35	1.5	42	65
III. 1836–40	0.7	37	65
IV. 1841–45	1.0	40	61
V. 1846–50	1.0	39	62
VI. 1851–55	1.1	48	61
VII. 1856–60	1.0	49	61
VIII. 1861–65	0.6	48	64
IX. 1866–69	0.5	47	68
X. 1872–76	0.7	49	66
XI. 1877–81	0.7	50	66
XII. 1882–86	1.0	40	65
XIII. 1887–91	1.0	48	60
XIV. 1892–95	1.0	48	58

If this table does not show (as might have been expected) so striking an increase of severity as is shown in the proportion of acquittals, it nevertheless proves that even in relation to the severity of punishment, repression has not at all diminished. We even observe that, in the Court of Assize (excluding the first period since it was before the general revision of the Code of the law of 1832), while capital sentences show a decrease in the later periods as compared with the earlier (and this is largely due to the laws of 1832, 1848, etc., which reduced the number of cases involving the death penalty) and at the same time show an increase after period VIII, sentences to hard labor and to reclusion (imprisonment) show a steady increase after period II, and especially from 1851. So, also, in the Tribunals, save for a few oscillations as in periods XIII and XIV, one observes, after 1860, a steady increase in the heavier sentences.

That this continual predominance of heavier penalties, both in the Tribunals and in the Assizes, really manifests a greater severity of the judges, is demonstrated by calling attention to the fact that there would otherwise have been, at the same time, an increase in the most serious delicts; and this is not the case since, quite on the contrary, we observe in France a general decrease in crimes against the person (except in criminal assaults against children) and especially in crimes against property. This helps to explain in part the reduction in capital convictions which occurred except in the last three periods.

Further, we find another eloquent proof of this severity in the similar movement of the statistics of acquittals in relation to those of the heavier sentences since

proportion of heavy penalties occurs notwithstanding the continual increase in the admission of extenuating circumstances, which, in the Court of Assize, increased from fifty-nine per cent. in 1833 to seventy-three per cent. in 1886 and, in the correctional Tribunals from fifty-four per cent. in 1851 to sixty-five per cent. in 1886. Furthermore, the number of trials in the Assizes for resisting arrest has steadily decreased, falling from a yearly average of six hundred and forty-seven in the period 1826–1830, to two hundred and sixty-six in 1882–1886, and one hundred and forty-three in 1891–1895. Finally, we find in the five years immediately following the establishment of the new Penal Code (1890), that in Italy criminality had a marked increase at a time when the severity of repression was also increasing. In England, on the contrary, it has been shown that in the last decade, while the severity of punishment continually decreased, crime did not increase but also actually decreased: a decrease all the more foreign to the other countries of Europe since it is brought about by the mitigation of the most widespread social causes of crime,

we observe, except in the last decade, that heavy sentences increase when the number of acquittals decreases (periods, IV, VI, VII, X in the Assizes, and II, V, VIII in the Tribunals), and vice versa the heavy penalties decrease when acquittals are most easy (periods V and VIII for the Assizes). This is a new proof that the lesser number of acquittals and the increased predominance of heavy punishment is actually the effect of a greater rigor on the part of juries and judges.

Cuche, "L'avenir de l'intimidation," in the "Rev. pénit" (1894), p. 786, says that on the contrary there is in France a current unfavorable to severity of repression and that this fact, *scientifically certain*, has been misconceived by Ferri.

Now, statistical figures are positive facts and they show us that repression in France has not decreased, either as to quantity (acquittals) nor as to quality (heavy punishments).

The contrary impression is only that of superficial observers, who, in seeing the increase in the *effective* number of light sentences, do not reflect (as we have just seen in the case of Tarde, apropos of undiscovered criminals) that this is due to the enormous increase of petty delicts and to the morphological evolution of criminality, which is becoming less and less violent.

An accurate opinion can be formed only from the *percentage figures*, and these figures in spite of any contrary appearance show the accuracy of my statement. Moreover, Cuche himself substantially admits that the proofs made have already produced a change in the views of criminalists, good eclectics like himself, who concede that penalties are not the remedy for crime, but are not yet willing to take from them all efficacy, and who make of penalties something like the paper of Dante, "not yet black, but the white of which is gone."

Hence, as a result, they end in recommending this aggravation of penalties which is the logical consequence of the old theory of intimidation, a theory systematized by Feuerback (psychological coercion) and now taken up again; a fact which proves that there is very little of inventive imagination among the eclectics (Dubuisson, Impallomeni, Alimena, Cuche, etc.) of whom we shall speak in Part III, *post*.

such, for instance, as the number of abandoned children and in general the betterment in the conditions of moral existence among the working classes, which are the most numerous.[1] Hence, we may conclude that while judicial repression in Italy and France, whether in the number of acquittals or in the predominance of heavy sentences, both in crimes and in delicts, has not become less severe, crime has constantly gone on increasing.[2] In this fact, which gives a categorical denial to the general opinion that the sovereign remedy against the overflow of delicts is in a more stringent repression, we have the right to see a positive proof that the systems of penalty and reclusion hitherto adopted have not fulfilled their duty of defending society against the most usual criminal attacks. For the future it is necessary to require of criminal law a better direction in the study of facts, so that the study of psychological and sociological laws may guide us in the function of social preservation, less towards a violent and always tardy reaction against actual criminal phenomenon, than towards a constant effort to eliminate or avoid its factors.

§ 154. Prevention of Crime not Punishment for Crime Needed.

The capital importance of this conclusion, drawn from the data of statistics, and the necessity of supporting it on general biological and sociological laws, requires a more complete explanation of the insignificant efficacy of punishment in fighting crime. And this is the more necessary since, after the second edition of this work appeared, a number of criticisms and objections were

[1] *Tarnowsky*, "La diminuzione della criminalità in Russia," J. M. J. (St. Petersburg, October, 1897), reviewed in the "Rev. pénit." (1898), p. 172.

[2] In this connection, *Le Bon*, "L'homme et les sociétés" (Paris, 1881), II, 389, gives a short statistical note intended by him to show that the increase of crime in France is due to a lesser repression. To prove this assertion, which is only the ordinary illusion on the efficiency of penalties, he contrasts the increase of convictions for crimes against the person from 1872–1876, with the decrease of capital executions. Really such a use of criminal statistics shows simplicity on the surface. Is the death penalty the sole element of repression? And what relation is there between capital executions and the total number of crimes against the person, which for the greater part are not punishable with death? It is necessary to glance at the capital crimes (assassination, poisoning, parricide, homicide) and it will be found that in these crimes, not in five years but in a half century, persons accused, tried, and sentenced fell off in spite of decrease in capital executions from 660 in 1826 to 398 in 1878. One should hence be persuaded that in order to judge the influence of repression on culpability, it is at least necessary to make the distinctions and the careful calculations of which in my opinion, I have given an example.

directed to this fundamental conclusion.[1] A consideration of the entirety and the diverse nature of anthropological, physical, and social factors, favorable or unfavorable to the genesis of criminal phenomena, readily proved that punishment has very little power against crime. Punishment, a legislative threat, possessing its greatest force as a psychological motive, obviously cannot combat the physical and social factors of crime, such as climate, morals, increase of population, or agricultural productivity, and economic and political crises which statistics show are the most sensible causes of the increase or decrease of crime. Consequently, in accordance with the natural law, which demands that the combating forces shall be of the same nature, since the fall of a heavy body cannot be prevented, deviated, or accelerated except by the force of gravity, it is evident that punishment, because it is a psychological motive, can oppose only the psychological factors of crime, and even among these only the occasional factors when they are not too sudden. It is further evident that punishment, unless applied in the isolation of the culprit, could not neutralize the organic and hereditary factors disclosed by criminal anthropology. It is not comprehensible, therefore, how, in face of the complexity of criminal factors, so different in kind and energy, punishment alone should be, in its simplicity, a panacea for all criminal impulses and for all delinquents. On the contrary, one can understand that it should only exert, as Roeder [2] said, the quite insufficient action which is the property of all panaceas.

§ 155. Three Sociological Strata of Delinquents.

Let us recall, in this connection, a fact too often forgotten by legislators, criminalists, and superficial observers. Every teacher who has any aptitude for psychological observation always distinguishes in his class three categories: the diligent and well-disposed pupils who work on their own initiative, without any need of disciplinary rigor; the ignorant and sluggish dullard (neurasthenic and degenerate) from whom one can extract noth-

[1] The basic importance of this conclusion (which if it should once be generally accepted would give an entirely different orientation to the measures of social preservation against the disease of crime) has recently been recognized by the "Conférence du jeune Barrau" of Brussels, which expressly established "an investigation of convicts to determine the efficacy of punishment both as a preventive and correctional means." See "Journal des Tribunaux" (23 October, 1898), Col. 1091.

[2] *Roeder*, "Las doctrinas fondamentales reinantes sobre el delito y la pena" (Madrid, 1877), p. 306.

ing good by either mildness or punishment: and, finally, the pupils who are neither too studious nor too stubborn and for whom a discipline based on the laws of psychology may be really effective. It is the same for soldiers, for prisoners, for every human association, and even for universal society. Groups of individuals, bound together by constant relations, form so many partial organisms in the collective organism of society and reproduce society itself in the partial organism just as a fragment of a crystal reproduces the mineralogical characteristics of the whole crystal.[1] The psychological and sociological laws are as constant as the physical and physiological. In criminal sociology we can divide the social strata into three categories; the class normally highest (and this is not always the class socially highest), which does not commit delicts because it is honest in its organic constitution, as the effect of a moral sense without any other sanction than that of its own conscience or of public opinion and even, as Spencer[2] remarks, by the effect of habit acquired and hereditarily transmitted, and (as I think should be added) maintained by favorable conditions of social life. This category, for which the Penal Code is perfectly useless, is unfortunately the least numerous in society.[3] Another class, lower in the scale, is

[1] There are, nevertheless, some differences between the manifestations of activity of a group of men and those of a whole society. This is why I think there should be a bond uniting psychology, which studies the individual, and sociology, which studies a whole society, into what might be called collective psychology. The phenomena proper to certain groups of individuals are governed by laws similar but not identical with those of sociology, and vary as the groups themselves are an accidental or permanent reunion of individuals: thus collective psychology has its field of observation in all of the more or less adventitious reunions of men: public roads, markets, exchanges, shops, theaters, committees, assemblies, colleges, schools, barracks, prisons, etc.

The practical applications to be deduced from these facts are numerous, as we shall see, for example, in Chap. IV, in treating of the jury according to the laws of psychology, and as Sighele, in developing this thought (which I had expressed in my first edition, 1881, p. 57), has quite fully demonstrated by his labors in collective psychology, *i. e.*, psychology proper to a visible and limited group of men. And for that very reason it is intermediate between individual psychology and social psychology or "Völkerpsychologie," appropriate to a whole society or to a class without visible limits of extension.

See *Sighele*, "La folla delinquente," 2d ed. (Turin, 1895), and "La coppia criminale," 2d ed. (Turin, 1897); *Le Bon*, "La psychologie des foules" (Paris, 1895); *Tarde*, "Foules et sectes," in "Essais et mélánges sociologiques"; *Rossi*, "L'animo della folla" (Cosenza, 1898).

[2] *Spencer*, "The Data of Ethics," 6th ed. (London, 1892).

[3] It is through forgetfulness of this difference in the social strata, that, for example, *Émile de Girardin*, "Du droit de punir" (Paris, 1871), was led to the idea that for the maintenance of social order, it would suffice to abolish punishment

composed of individuals refractory to every sentiment of honesty because they are deprived of education and always held by material and moral wretchedness in the primitive condition of a savage fight for existence. They receive as an inheritance (which they transmit to their descendants through marriage with other individuals of the same category) an abnormal organization, which unites, as we have seen, with a pathological and degenerate constitution in a real atavistic return to the savage state. From this class is recruited the greater part of the contingent of born-criminals, against whom punishment as a legislative threat has least efficacy because they lack the social sense which would make them regard punishment otherwise than as the risk naturally attached to crime, in the same way as other dangers are attached to honest industrial activity. The third social class is composed of individuals, not born to crime, but whose honesty will not withstand a test, who oscillate between vice and virtue, who are not devoid of moral sense and who often have a certain amount of culture and education. For these, punishment, within the narrow limits of a psychological motive, may be really efficacious. It is precisely for this class, which furnishes the most numerous contingent of occasional criminals, that punishment offers some utility, especially when in its application it inspires scientific principles of sane penitentiary methods and criminal psychology, and when seconded at the very outset by efficient social measures to prevent the occasions for crime.

§ 156. Punishment as a Preventative and the Three Classes of Criminals.

Garofalo, appropriating these ideas, concludes that while there is some temerity in a general assertion that punishment lacks preventative efficacy, yet it is necessary to distinguish between the classes of delinquents capable of feeling the full value of the menace and those upon whom it acts with but limited force.[1] Yet this conclusion as to the very limited efficacy of punishment, shown by the observation of facts and proven, in fact, as Bentham says, by the infliction of every punishment, since the infliction proves that the penalty could not prevent the crime,[2] is opposed by an illusion so deeply-rooted that even some positivists have

and substitute the sanction of public opinion. He forgot that while this sanction would suffice for the class of honest folk, yet something more conformable to their sentiments and natural tendencies is required for the class of evildoers.

[1] *Garofalo*, "Criminology" (Little, Brown & Co., 1914), p. 208.

[2] *Bentham*, "Treatise on Civil and Penal Law," Introd., p. IV.

not escaped it. Although they agree with me in the end, they either declare that "the persistence with which crime is committed proceeds from the lack of an opportune repression" [1] and "that one of the principal causes of the increase of crime in Italy is the mildness of punishment," [2] or they neglect the first question which should be put in the matter of criminal sociology, namely, whether penalties of any kind (in which they believe that they see excellent defensive weapons) actually have the virtue of social defense and to what extent they possess it.[3]

While our conclusions are divergent from those of the partisans of penal severity, yet they do not agree with the conclusions of writers who place too much confidence in the mildness of punishment. There always remains this essential difference: while the latter do not reach (as some have done) the apex of exaggeration in believing that punishment is the more efficacious and useful against crime (I mean natural crime) in the ratio of its mildness, they nevertheless (if not in words at least in fact) retain their exclusive confidence in the action of penalties. We, however, believe (and this idea, sustained by the positive school in new experimental proofs, has gained much ground), we believe, I assert, that first of all it is necessary to have recourse to other methods and means than penalties for the defense of society. We believe, in a word, that remedies should be adapted to the different factors of crime. The factors most susceptible of being changed, as well as the most active, are the social factors, and we maintain, as Prins says, that "social remedies are appropriate to social ills." [4] Hence Tarde's remark is inaccurate when he says that our conviction of the quasi-utility of punishment is solely the effect of our theories on the anthropological and physical nature of crime and that, "inversely, the important predominance attributed by him to social causes in the origin of crime, prevents him from accepting this conclusion." [5] In reality, since punishment as a psychological motive is an anthropological measure, and as a material preventive is a physical measure, it should, in abstract logic, correspond to the theory of crime which is exclusively biological and physical.

[1] *Quételet*, "Anthropométrie," Lib. V, § 5.

[2] *Lombroso*, "L'incremento del delitto in Italia" (Turin, 1870), p. 28.

[3] *Beltrani-Scala*, "La riforma penitenziaria in Italia" (Rome, 1879); *Garofalo*, "Criterio positivo della penalità" (Naples, 1880).

[4] *Prins*, "Étude sur la criminalité d'après la science moderne," in the "Revue de Belgique" (15 December, 1880).

[5] *Tarde*, "La philosophie pénale" (Lyons, 1890), p. 468.

On the contrary, it is because I recognize also the influence of environment, that I maintain experimentally the inefficiency of punishment as a remedy for crime, when, aside from punishment and before punishment, nothing is done by other means to neutralize or diminish the crime-producing action of social factors.

§ 157. Prevention the Object of Criminal Laws.

The Classical School, confronted with the excess of rigor of the Middle Ages, was solely preoccupied, and properly so, with the mitigation of penalties. It could not (since each epoch has its mission) seriously occupy itself with that other more useful and more efficient task, which consists in anticipating crime. A small group of thinkers, by the nature of their minds more prone than the others to positive studies (I shall cite them further on), in vain opposed a few bold and profound pages on preventative methods to the numerous volumes which were written on punishment. They were not listened to simply because science had not yet demonstrated the multiple factors of crime and the great majority of criminalists, legislators, and judges were concerned only with repression. We have, it is true, the platonic declarations and, as Bentham says, "the empty declamations" of a multitude of writers on the sole and real utility of prevention in relation to repression. But the facts do not bear out the words. I limit myself to the citation of a few examples in order to show that in all classes, among practical men such as public officers and legislators, the error, that punishment is the real panacea for crime, reigns supreme. The practical men declare that "a prohibitive penal law should be considered the first, the grandest, the mistress of preventive laws." [1] Public officers, concerned at the steady extension of crime, propose a more vigilant and more severe repression as the sovereign remedy. A counsellor of the French Court of Cassation writes: "In a good social police there is no better safeguard for order and security than intimidation." [2] Legislators speak the same way. In France the Minister of Justice ("garde des Sceaux") in his report on judicial statistics for 1877 treating of the steady increase of rape and criminal assaults concludes thus: "In any event, only a firm and energetic repression can react against such a deplorable spread

[1] *Musso*, "Il codice penale in Italia," R. E. (16 January, 1881).
[2] *Aylies*, "La question pénitentiaire," in the R. D. M.

of outrages against good morals";[1] and even more recently another French Minister of Justice concludes a volume of statistical recapitulation from 1826 to 1880, by saying that the increase of crime "cannot be combated except by an incessantly energetic repression."[2] Tarde also becomes a party to these words, falling into the common illusion, when he says; "if crimes are only, as is asserted, the railway accidents of society under full steam, it should not be forgotten that a fast train requires a more powerful brake and there is no doubt that such a state of things demands an increase or a change of repression and of penalties."[3] Our conclusion is not new; but, as Stuart Mill said, there are two ways to advance useful innovations; either to disclose what was not previously known, or to place again in honor and fortify with new proofs the truths too much neglected. While some criminalists, with the aid only of sagacious observation guided rather by a positivist turn of mind than controlled by the strict laws of the method, have continued to repeat the phrase "Quid leges sine moribus?" — and to proclaim this truth, that it is better to anticipate crime by suppressing its causes than to fight it by useless repression, their voices have not been heard. But when a science, animated by a new spirit and profiting by the positive researches of criminal sociology, proclaims the same truth and confirms it by the study of the natural causes of crime, it is very probable that this truth will pass from the theoretical field of scientific principle into the fertile domain of practical application.

§ 158. History of Punishment.

The error of seeing in the influence of penalties a serious obstacle to crime is so widespread that it is worth the trouble of seeking its historical and psychological reasons, since "an examination of its genealogy is a way to avoid impatience in judging of the value of an idea":[4] in that way we shall find many arguments in favor of our conclusion. If we pass over the primitive foundation of vengeance, derived from the savage period of private struggle and passed into the spirit and rites of the first penal laws and which endures yet in a state of survival in the laws

[1] *Dufaure*, "Rapport sur la statistique de 1876" (Paris, 1878), p. xli.

[2] *Humbert*, "Rapport sur la justice en France de 1826 à 1880" (Paris, 1882), p. cxxxi.

[3] *Tarde*, "La statistique criminelle," in the R. P. (January, 1880), p. 59. For Italian examples, see the Italian editions; 4th ed., pp. 379–380.

[4] *Spencer*, "The Nebular Hypothesis."

of modern society, if we disregard, also, the hereditary effect of the stern traditions of the Middle Ages, which, like the preceding element, contributes to an unconscious sympathy for the severity of penalties especially in the case of more serious and recent crimes, — then one of the principal reasons of this tendency is an error of psychological perspective which causes us to forget the considerable differences, that I mentioned just now, between the ideas, habits, and feelings of the different social strata.[1] It is because of this forgetfulness that honest folk confuse the idea they have of penal law and the impression they receive from it, with the very different idea and impression of the social strata which furnish the greatest number of delinquents. This has been frequently remarked (although too much neglected) by Beccaria,[2] Carmignani,[3] Holtzendorff,[4] and by those who, like Lombroso, have studied the peculiar language ("argot") and literature wherein criminals mirror themselves as in a psychological glass.[5] It is further forgotten that in the case of normal men, the greatest repellent efficacy, after physical and moral repugnance to crime which is the strongest, is not so much in the legal sanction as in the sanctions of secret conscience and of public opinion. On the contrary, these sanctions are unknown, or practically unknown, to the abnormal individuals who, in their organic

[1] *Maine*, "Ancient Law," Chap. X.

[2] *Beccaria*, "Dei delitti e delle pene," § 21.

[3] *Carmignani*, "Teoria delle leggi," Lib. III, P. I. Cap. V.; P. 2, Cap. I.

[4] *Holtzendorff*, "Das Verbrechen des Mordes und die Todesstrafe" (Berlin, 1875), Chap. II.

[5] *Lombroso*, "L'uomo delinquente," 5th ed., P. III, Cap. X, XII; *Venezian*, "Vocaboli e frasi del gergo veneto," A. P. II, 2; *Mayor*, "Nota sul gergo francese," *id.*, IV, 4.

Habitual criminals call the galleys ("le bagne") "the happy house" and the jail (prison) the "little Milan," or "Casanza" or "home" ("terra tua"). The songs of the convicts have similar terms in the "Canti Siculi" of *Pitré*, for example:

"Cu'dici ca la carzara castia
Cuma v'ingannati, pavireddi."
"Who says the prison chastens,
"How are you deceived, poor people!"

and

"Prison, my life, dear happy prison!
"How I love to be within thy walls! . . .
"There only findest thou brothers, there friends,
"Money, good table, bread and joy." . . .

A song of the French prisons ends with this refrain:

"Adieu! Nous bravons vos fers et vos lois."
"Farewell! We brave your irons and your laws!"

and psychic constitution represent a retarded form of human evolution. In the higher classes an example will suffice, and it is the fact noted by Spencer [1] that gambling debts and debts of the Stock Exchange are paid scrupulously although there are neither penal sanctions nor authentic writings. And here is an observation that should be appended: the debtor's prison was never sufficient to cause contracts to be punctually executed, so that it was finally abolished, and the suppression of the penalty did not have the effect of increasing the number of defaulted contracts. In the lower classes, it is sufficient to have once visited the prisons. There if one asks a convict why the penalty has not deterred him from crime, he generally answers that he did not think of the penalty; or else he answers, as an habitual thief at Turin answered me, and as many others have repeated to me in other prisons, that "if one is afraid of undergoing ills through working, one finally ceases to work." Such, in effect, must be the feelings and the thoughts which rule the lower social strata, where ideal conceptions of honesty or even of personal interest (according to which in the long run, virtue is always the most advantageous) cannot penetrate the material, moral, and intellectual misery. Stanley observes that flint-locks, weapons used by civilized countries for centuries, are only now appearing in the interior of the Black Continent. In like manner the psychologist whose observations penetrate the lowest social strata notes that it is only now (so unhappy and inhuman are the conditions of their life) that a distant echo of certain feelings and certain ideas, long possessed by the upper strata, is making itself heard in those depths.

§ 159. Exceptional Penalties and Repression.

Another equivocation that helps to maintain this exaggerated confidence in the efficacy of penalties is that the effects of the codes with their slow and circumspect procedure are likened to the effects of exceptional laws and of their summary procedure. They say: "It is an established fact that the energetic repressions of Sixtus V in the Papal States; of the Austrians in 1849 against the bands of Este and Brescin; of the French under Manhès in Calabria; of the Italians under Pallavicino and Medici, have been able to control and sometimes even to suppress collective delicts. And certainly the crimes of the internationalists of

[1] *Spencer*, "Introduction à la science sociale" (Paris, 1878), p. 15.

Paris and Alcolea have been repressed for a long time by sudden massacres. The Pica law diminished brigandage in the province of Naples. The law of 6 July, 1871, reduced the number of affrays in Romagna." [1] In this connection there are a number of things to be observed. First, with regard to history the same author recalls that assaults were renewed and multiplied notwithstanding the most severe penalties.[2] To refer to the single striking instance of the repressions of Sixtus V, history shows that this period of extraordinary and savage severity had scarcely closed (it is well known that when there were no bandits to exterminate, the legates of Sixtus V and his governors caused the corpses of persons of low degree to be decapitated in the cemeteries and sent the heads to Rome as those of executed criminals), and Sixtus V had scarcely died, when all the chiefs of the band who had escaped the searches of the pontifical legates reappeared as by magic. Sacripante in the Maremmes, Batistella in Latium, Piccolomini in Umbria, reappeared at the head of bands which seemed to spring from the earth and to the number of 15,000 in 1595. And yet executions continued on a large scale. The Venetian ambassador to Rome under Clement VII wrote as follows: "The severity of justice is such that the executioner has difficulty in attending to it. Capital punishment is inflicted on the bandits and their accomplices; and yet their number is so great that no day passes without the sight of the heads of those executed being brought in or their corpses exposed on the bridge of Saint-Ange, four, six, twenty, or even thirty at one time placed in a row side by side. It is estimated that there have been more than one thousand executions from the pontificate of Sixtus V (1590) to the present year (1595). And a strange thing is that it is said that this severity has only caused the increase of brigandage." [3] I might offer similar answers to the other examples cited by Tarde in maintaining the efficacy of penalties,[4] and reply that being exceptional measures of social defense, they cannot afford very serious conclusions in the matter of ordinary, slow, and uncertain penalization. In reality, exceptional laws against a particular form of

[1] *Lombroso*, "L'incremento del delitto in Italia," p. 29. Yet in his "L'uomo delinquente," 5th ed., Vol. III, he no longer classes energetic repression among the remedies for crime, and hence participates in my conclusions.

[2] *Lombroso*, "L'uomo delinquente," 5th ed., Vol. III, pp. 8, 20.

[3] *Dubarry*, "Le brigandage en Italie" (Paris, 1875), pp. 105, 114. To the same effect is *Despine*, "Psychologie naturelle," III, p. 303.

[4] *Tarde*, "Penal Philosophy" (Little, Brown & Co., 1912), pp. 473, *et seq.*

ordinary or political criminality which have become more frequent at certain moments have contributed to maintain the illusion on the efficacy of punishment. As in such case they are directed against an acute manifestation of real delinquency or of pseudo-crime and as this access is of itself transitory and hence destined to rapidly pass away, it is to the penalties that criminalists (and public opinion more fully) freely attribute a preventive or curative power which they do not really possess, by virtue of reasoning "post hoc ergo propter hoc." This has happened and still happens in the case of brigandage in certain provinces of Italy, and in the case of anarchistic attempts in many countries of Europe. Thus Garraud, at the Congress of Geneva (1896), repeating what he had already declared in a publication,[1] and yielding to the common illusion, asserted that the "application of exceptional laws resulted in a decrease of anarchistic attempts" (Ravachol, Vaillant, Henry, Caserio). I replied to him that this efficacy could be attributed neither to the exceptional laws nor to the ordinary penalties because these penalties are stimulants to crime in the cases where political or religious fanaticism greedily seeks martyrdom and the notoriety which it brings; or else, that in any event, "these anarchistic attempts were symptoms of a species of social fever which after attaining its maximum must naturally decline and then disappear in a more or less definitive fashion." [2] And the facts have more than borne me out: for without any cessation of the régime of exceptional laws, there was a recrudescence of anarchistic attempts (Angiolillo, Luccheni, Acciarito), a year or two after the Congress of Geneva.[3] Exaggerated repression is not, therefore, always a remedy: but further, as Carrara [4] remarks, such measures, being inspired by the "jus belli," cannot and do not constitute the ordinary process of the punitive function which has not their principle of action, that is, the instant and not too scrupulous exercise of the rights of war, with extermination of the guilty and often also of the innocent. Exceptional laws should never be other than an entirely transitory régime.

[1] *Garraud*, "L'anarchie et la repression," § 95.

[2] "Actes du 4e congrès d'anthropologie criminelle" (Geneva, 1897), p. 254, 255.

[3] *Dreyfus*, therefore, utters an inexact assertion when he says ("La lutte legale contre l'anarchisme," in the "Rev. Pénit.," 1896, p. 753): "Whatever opinion one may have of the legality of exceptional laws, no one disputes their efficacy." No: they are illegal and ineffective.

[4] *Carrara*, "Programma," § 662, N. 2.

§ 160. Distinction of Fear of Punishment and Repressive Penalties.

It should especially be remarked that no sufficient distinction is made of the different moments of the application of penalty and that its possible effects are confused. It is essential to distinguish the penalty prescribed in the Code, from that applied by the judge, especially with the intervention of a jury, and particularly from that applied by the jailor. That punishment should inspire fear in a criminal who is already in custody and is about to be convicted, is a natural fact, but it does not in any way prove the efficacy that the legislative menace should have had in order to turn him from crime.

§ 161. Repressive Force of Penalties; a Summary.

If, now, to the natural sentiment of vengeance, — to the historical traditions, — to the neglect of organic and psychic differences among the different social strata, — to the confusion that reigns between exceptional laws and the regular primitive function and between the different moments of penal application, — we add the force of a fixed habit of thinking in a certain way and the natural tendency of the administrators of the penal law to fix their attention exclusively on the penalties; if we consider, further, how easy it is to believe, with the common opinion, that it suffices to draft a penal law in order to get a remedy for social infirmities or to prevent their aggravation — then we have little difficulty in understanding how this exaggerated confidence in punishment (which is constantly belied by facts and by psychological observation) always persists and shows itself in every theoretical or practical discussion. Certainly human activity, like that of the animals, covers the whole distance between the two poles of pleasure and pain, by the attraction of the one and the repulsion of the other. Punishment, a form of pain, is, indeed, always a direct determinant of human conduct, as it is also an indirect guide of conduct as a legal sanction, by unconsciously making respect for law deeper and stronger. But the first observation, which is conformable to a great psychological law, shows that punishment is in itself natural and that it is absurd to assert its absolute inutility and impotence or to propose its abolition, — that observation does not contradict our assertion that punishment is of but very feeble efficacy as an obstacle to crime.

A distinction between natural penalty or sanction and social

penalty or sanction shows that the potency of natural penalty, great as it is, evaporates for the most part into social penalty. And social penalty is, more or less, in every system but a wretched imitation or caricature of natural punishment. The mute but inexorable resistance of nature to every act which transgresses her laws and the painful consequence resulting to the doer of the act really constitute an extremely effective penal system, from which man, especially in the less developed stages of his intelligence, savagery, and infancy, receives continued lessons and learns not to repeat certain harmful actions. This "discipline of natural consequences," as it is called in pedagogy, is certainly a good educational régime, as Rousseau has already said, and as it has been explained by Spencer[1] and Bain[2] among others. Punishment in this natural, spontaneous form draws all of its force from the inevitableness of its consequences. One of the rare observations of practical psychology made and repeated by the classical criminalists is that, especially in the case of the death penalty, the certainty of punishment has more power than its severity. To this I add another psychological law, that a slight uncertainty reduces to a greater extent the repulsive force of the pain feared than a great uncertainty reduces the seduction of the pleasure anticipated. We see a first and powerful reason for the weak efficacy that legal penalties are capable of when we think of all the probabilities of escaping them, which suggest themselves to the mind of one who commits an anti-juridical act. The probability of not being discovered, which is the first and strongest motive to the act meditated; the probability that if detected, the proof will be insufficient, that the judges will be lenient, or that they can be deceived, that the judgment will be dissipated in the turns of a labyrinthine procedure, that a pardon will come to prevent the sentence or to commute it, and that the execution of the punishment will be lessened through the mechanism of a conditional release, and so on: these are all so many psychological forces opposed to the natural fear of untoward consequences, forces which are unknown to natural sanction while, on the contrary, they destroy the prohibitive efficiency of legal penalty. Further, there is another psychological condition which, while not leaving

[1] *Spencer*, "Education" (London, 1863).

[2] *Bain*, "The Science of Education." *Guyau*, "Éducation et hérédité" (Paris, 1889), makes some objections to this pedagogical doctrine on the assumption that it is desired to make it the sole and exclusive criterion of pedagogy and not simply one of its directing rules.

the force of natural penalty intact, almost annihilates that of social penalty. This is the improvidence by which we see man defy even the most certain natural consequences and by which these consequences are powerless against certain acts which are perilous or contrary to nature. It is quite another thing in the antagonism between criminal impulsion and penal counter-impulsion if we recall that even aside from the rage of passion criminals and even occasional delinquents have, in common with savages and children, a special improvidence which, already great in the inferior classes whence they generally spring, constitutes in their case, as demonstrated by criminal anthropology, a specific mark of psychological imperfection.[1] Now, while a very small force is sufficient to produce very considerable and constant effects when it operates in the natural way of organic and psychic laws,[2] every measure, on the contrary, which departs from the natural tendencies of man, will always encounter a resistance which will combat it and finally master it.[3] Life teaches this lesson every day. Women whose pelvic bones are badly formed become mothers in spite of the immense danger of the Caesarian operation, and sometimes even after once having undergone it. Men consort with prostitutes, and often without any precaution taken and without being deterred by the fear of syphilis. Despine narrates that at Bilbao, in 1866, during a cholera epidemic many persons brought on diarrhea in order to obtain the gifts of the charitable society, although some died through the transformation of diarrhea into real cholera.[4] Fayet, in a study on the professional statistics of persons charged with crime in France during a period of twenty years, remarks that the greatest specific and proportional criminality is furnished by notaries and bailiffs ("hussiers") who know better than others the penalties with which the law menaces the guilty.[5] To this we may add that in the forgery of banknotes, the forgers write and engrave the famous warning: "The law punishes forgers, etc."; and in spite of this stern notice they proceed with the criminal work. The classical criminalists themselves declare that even the death penalty has

[1] See the proofs of this improvidence of punishment in my "Omicidio," pp. 521 *et seq.*

[2] *Gibbon*, "Decline and Fall of the Roman Empire," Chap. XV.

[3] *Beccaria*, "Dei delitti e delle pene," § 2.

[4] *Despine*, "Psychologie naturelle," III, p. 262.

[5] *Fayet*, "Statistique des accusés," in the "Journal des économistes," 1847; to the same effect *Fregier*, "Des classes dangereuses, II, III, pp. 370–372.

no real efficacy for the intimidation of criminals, if only for the reason, as Montesquieu and Beccaria have said, that men become accustomed to it like anything else. This is confirmed by the striking fact, observed by the Almoner Roberts and by the magistrate Bérenger, that many persons sentenced to death had already witnessed capital executions,[1] and by the other fact brought to light by Despine[2] and by Angelucci[3] that murders are often committed, in the same town, on the same day, and sometimes in the same place that capital executions are conducted. Man is always indentical with himself and certainly no penal code, be it mild or harsh, can destroy in him natural and invincible tendencies such as the attraction of pleasure and the continued hope of impunity. Again, the lasting efficacy of any measure, in the political, economic, or administrative domain, is always the inverse ratio of its violence and suddenness.[4]

§ 162. Moral Prevention of Crime.

Penal law, education, and pedagogy were formerly based on the idea of conquering the human passions by brute force. The rod ruled supreme. It began to be understood that this produced the contrary of what had been expected, because it provoked violence or hypocrisy, and the severity of chastisement was softened. It is only now, however, that it is being discerned in pedagogy how advantageous it is to rely simply on the free play of natural tendencies and of physio-psychological laws, the better to regulate individual activity practically. Indeed, since everything in pedagogy comes around to a task of suggestion and since suggestion is the passage of an idea from one brain to another where it takes root, it is clear that if one wishes to impose an idea violently it has an infinitely small chance of taking root and organizing in the brain of another. Persuasion which indicates the reasons and advantages of the idea suggested, together with care to avoid adverse ideas, has an incomparably more positive and surer efficacy than the compression which coerces contrary tendencies and the constraint which tries to impose the ideas or the tendencies

[1] *Livi*, "La pena di morte," R. F. (1876), I, 478.

[2] *Despine*, "Psychologie naturelle," III, pp. 370–372.

[3] *Angelucci*, "Gli omicidi di fronte all' esecuzione capitale," R. F. III, 694. See the documents establishing this "inefficacy of penal intimidation" in my "Omicidio," p. 368.

[4] *Stuart Mill*, "Fragments inédits sur le socialisme," in the R. P. (March, 1879).

of which the acquisition is desired.[1] This is why the work of social defense, to speak like Romagnosi,[2] should be less a material effort of repression that a moral effort of prevention founded on the free play of physio-psychological and sociological laws. It is a fact that violence is a bad remedy for violence and always further incites it. In the Middle Ages, when the penal reaction was so brutal, the criminal acts were just as ferocious, and society by giving an example of its immoral emulation of wrongdoers moved pitiably in a vicious circle. Even to-day, as Ardigo[3] remarks, in the lower social classes the man who is often violent is himself more frequently mistreated; so that the scars of criminals are a true professional characteristic.

§ 163. Punishment is a Negative Repressive Force.

In conclusion, our doctrine on the efficacy of penalties is not, as classical criminalists have for controversial purposes pretended to think, the absolute denial of their efficacy, but it is the denial of the common and inveterate prejudice, according to which they are the best and most useful remedy against criminality. We say in substance: punishment, as a means of repression, has rather a negative than a positive efficacy. This is not merely because it has not the same hold on all categories of delinquents. Its utility is not in the imaginary power of changing an anti-social being into a social man, but rather, and primarily, in avoiding the very considerable evils which would be produced by impunity, either in demoralizing the public conscience with respect to criminal acts or in further increasing the improvidence of criminals or, finally, in opposing no material obstacle to the repetition of delicts by convicts who are at least rendered harmless during the term of their expiation.[4] In education it is exactly the same. There is a general exaggeration of the power for transformation possessed by penalties. But education, which from earliest age

[1] Even in taming and training animals, it has been learned by experience that violence is of little use and that better results are obtained from the free play of basic psychological laws. *Le Bon*, "Les bases psychologiques du dressage," R. P. (December, 1894), p. 596; *Letourneau*, "L'éducation des animaux," Chap. I; "L'évolution de l'éducation" (Paris, 1898).

[2] *Romagnosi*, "Genesi del diritto penale," § 920.

[3] *Ardigo*, "La morale dei positivisti" (Milan, 1879), p. 528.

[4] There is a similar opinion in *Notaristefani*, "La funzione psicologica della pena," S. P. (July, 1894), p. 617, where he holds "that the criterion of punishability is found in the necessity of avoiding the dangers of impunity." To the same effect is *Zerboglio*, "Le pene e la loro efficacià," *id.* (September, 1897).

exercises a prolonged action and therefore a greater effect than punishment, owes its advantages to the fact that it prevents the development of the anti-social tendencies, the germ of which exists in nearly all men, rather than to the power credited to it of creating social tendencies and energies in individuals who have not inherited them at birth.[1] This negative efficacy of punishment, particularly during the term of its practical execution, has caused us to adopt the views which we shall develop,[2] namely, that we do not disapprove the tendency of the classical school to make penalties milder in their disciplinary application but that we see a complete and dangerous error in the continual mitigation which it is desired to extend even to the viewpoint of duration. Indeed, we understand very well that punishment should not be a gratuitous and inhuman torment; but we are opposed to this upheaval of every principle of social justice which would have prisons more convenient and more comfortable than dwellings of poor and honest folk who may, so long as they remain honest, die there of acute or chronic starvation since society assures them food and lodging only when they commit culpable acts.[3] This is also our reason for withholding sympathy from the cell system, until now so strongly in vogue with classical criminalists and penalogists. It is inhuman, stupid, and needlessly expensive. It is a psychological absurdity and a social peril that punishment for ordinary criminals with congenital tendencies should be the more or less brief segregation of the convict temporarily placed outside of civil life. Yet such is the idea with which the new Italian Code is inspired. Without mentioning the disastrous effects of short sentences, inducing corruption and habitual criminality (effects now unanimously deplored by penologists), it is evident that we thereby take from punishment the surest part of its negative efficacy against atavistic criminality, the value it at least has of preventing the repetition of criminal attacks during the whole period of expiation.

[1] *Ferri*, "Socialismo e criminalità," Cap. III.
[2] G., P. IV, *post*.
[3] *Ferri*, "Lavoro e celle dei condamnati" (Rome, 1886).

CHAPTER V

EQUIVALENTS FOR PUNISHMENT

Equivalents for punishment — Examples in the economic, political, scientific, administrative, religious, family, and educational orders. Alcoholism. Vagabondage. Abandoned infancy.

§ 164. Need of Other Means of Social Protection than Punishment.

It being established that punishment, far from being the convenient panacea which it seems to classical criminalists, legislators, and the public, has but very limited power to combat crime, it is natural, therefore, that the criminal sociologist should seek other means of defense from the positive observation of facts and of their natural origin. The thousand experiences of daily life, of the family, of the school, of associations, as the history of the vicissitudes of societies, teach us that, in order to render the explosions of the passions less pernicious, it is better to approach them from the flank at their very source than to attack them from the front. The intelligent husband in protecting the fidelity of his wife counts on something quite different from the articles of the code prohibiting adultery. Bentham relates that in England by combining the transportation of passengers with the postal service the annoying delays due to drunken couriers, against whom heavy fines were useless, were completely done away with. Certain discreet shelters arranged in convenient places contribute more to the cleanliness of cities than fines and arrests. The head of an industry obtains from his workmen more assiduous labor and a more satisfactory production, by interesting them, if only to a slight degree, in the profits than by fines and punishments. In the German universities, academic jealousy and intolerance has been largely neutralized by rewarding the professors in proportion to the number of their students, and hence, by interesting the faculties in calling and favoring the best masters in order to attract a greater number of students.

Again, the activity and zeal of professors, magistrates, and employees is excited by increasing their emoluments, not alone on account of seniority but on account of the progress proved by

their publication, by the number of decisions left unchanged, or proceedings unreversed. Every one knows that the workman labors more when he is paid by the job than by the day, and many manufacturers abuse this fact to exploit his working capacity. The troublesome and destructive activity of children is better regulated by amusing them with suitable games than by striving to stifle or punish it, to the great injury of physical and moral hygiene. In the same way, labor in insane asylums and prisons is a much more effective instrument of discipline and order than chains and irons. The Minister of Public Instruction, Villari, admitted, in the session of 14 March, 1891, that the suppression of antiquities and their sale abroad, which could not be prevented by the strictest penalties, had, on the contrary, been prevented by the offer of a reward to the finder of such an object who faithfully reported it. It is thus again that a well-advised housewife procures a less breakage of dishes by her servants when she allows them a slight increase of wages intended to pay for broken dishes and thus induces them to use more care. Briefly: one obtains more from men by flattering their self-esteem or appealing to their interest than by using the constraint of authority. While Romagnosi was right when he said penal counter-impulsions should be opposed to criminal impulsions in the social order, yet it is more exact to say that, instead of relying on the acting of direct counter-impulsions it avails more to first seek the suppression and indirect prevention of criminal impulsions, because, when once developed, it is futile to oppose them with punishment which has so little hold and which is only applied after it has been ineffective as a legislative threat. Now, since punishment as an instrument of social defense answers its purpose poorly, recourse must be had to other measures which may be substituted for it in satisfaction of the social need of order.

§ 165. Penalties. Substitutes.

From this springs the idea which I have called the equivalents of penalties ("sostituiti penali" — penal substitutes). While the social edifice will not be radically changed in its economic, and hence in its moral, political, and judicial bases in accord with the data and conceptions of socialistic sociology, we are certain that wherever these measures shall be able to exert their efficient power for prevention, no crime will be committed. That is to say, that the prevention of crime will be attained not through

penalties, but through these measures which within the limits of their efficacy are substitutes for penalties and not, as one of my benevolent critics preferred to think, agencies coöperating with penalties.[1] Since there is, as we know, a law of criminal saturation by virtue of which there is in every social medium a minimum of natural and atavistic criminality due to anthropological factors — because perfection does not exist in this world, — for this minimum, penalties, transformed according to the criteria which we shall see later, will be the last and indispensable obstacle to the inevitable and sporadic manifestations of criminal activity. The equivalents of penalty, once assimilated, thanks to the new lessons of criminal sociology, by the convictions and habits of legislators, will be particular antidotes against the social factors of crime. They will serve as a practical and gradual transition in

[1] "Rassegna settimanale" (September, 1880), Vol. VI, No. 140; and similarly, *Garofalo*, "Criminology" (Little, Brown & Co., 1914), pp. 372, *et seq.* When I published my theory of the equivalents of penalty in the "Archivio di psichiatria" (1880), pp. 67 and 214; *Turati*, "Delitto e questione sociale" (Milan, 1882), made me the objection, that such a system is too fragmentary, since it does not remove the first and universal cause of crime, poverty: hence, he said that the radical solution of the penal system is socialism which by suppressing poverty suppresses crime. I answered him in my work "Socialismo e criminalità," where conceding the basic truth of the socialistic idea, I opposed, on the one hand, whatever of utopian there was in the then socialism which was not yet inspired in Italy by the scientific positivism of the Marxian sociology: and, on the other hand, I maintained that the elimination of poverty would not bring about the complete disappearance of all crime: since one might suppress the epidemic forms of crime but not the acute and sporadic forms. *Colajanni* intervened in our controversy "Il socialismo" (1st ed., Catane, 1884; 2d ed., Palermo, 1898), but with outoriginality of view and confined himself to the relation between biology and socialism. When I had studied and understood the inductions of the Marxian sociology and when I saw that it eliminated the utopian part of socialism which I had fought in 1883, I openly accepted its theoretical and practical conclusions. I even proved that Marxism (economic transformation) is in perfect accord with biological transformation (Darwin) and with universal transformation (Spencer). See my work "Socialismo e scienza positiva." I there again maintained my thesis that socialistic organization should cause the disappearance of the epidemic forms but not of the acute and sporadic forms of criminality. I held, also, that in the transition period between bourgeois civilization and socialistic civilization, the system of equivalents for penalties was a practical necessity which moreover furthered the evolution of society towards the socialistic phase by eliminating the barbarous fetishism of penal repression.

The theory of equivalents for penalties has received such a consecration (for example, England which experienced a reduction of criminality, thanks only to its institutions for social prevention) that from that time the theorists of socialism are agreed in accepting my ideas on this point, whenever they approach the problem of crime formerly entirely neglected by them.

See *Ferri*, "Recenti publicazioni di socialismo," S. P. (October, 1898), cited by *Lichtenberger*, "Le socialisme et la revolution française" (Paris, Alcan, 1899), p. 193.

reaching this social metamorphosis in the name of which it will not, however, be legitimate to oppose these measures by treating them as mere palliatives and by rejecting, with the impatience of generous aspiration, that practical patience which submits to the tyranny exercised by the law of evolution even in social life. Social organisms, like animal organisms, are capable only of partial transformations, which, however, in accumulating and mutually supplementing each other, constitute the different phases of social evolution. These equivalents for penalty should not, however, be the destination of a superficial social reform, but rather the point of departure in passing to a social order very different from that of today. The only justification of the theory of equivalents for penalty is this new order, and its only efficient utility is attaining that order; and thus, by adopting the collective ownership of the means of production and labor, and by thus assuring really human conditions of life to every human being who shall have done his duty (children and the sick excepted) in furnishing his daily toil in some form or other, will be accomplished the drying up, as Fauchet says, of "three great springs of crime: extreme riches, extreme poverty, and idleness."

To propose these equivalents for penalty amounts to saying this: It is necessary, in legislative dispositions (political, economic, civil, administrative, and penal), from the great institution down to the slightest details of its existence, to give the social organism an orientation such that human activity, — instead of being uselessly threatened with repression shall be constantly guided in an indirect manner into non-criminal ways, and such that a free overflow shall be offered to the energies and needs of the individual whose natural tendencies will be hurt as little as possible and who will be spared as much as possible the temptations and occasions of crime. This fundamental idea of the equivalents for penalties shows how necessary to the sociologist and to the legislator is the preparation in biological and psychological knowledge on which Spencer rightly insisted.[1] The basic idea of the equivalents for penalty, rather than their explanatory and detailed enumeration (incomplete and open to discussion in detail) should be present to the mind when it is sought to judge their theoretical and practical value as a part of the general doctrine of criminal sociology. On the efficacy of a given one of these equivalents, I may find myself in more or less accord with those who have ex-

[1] *Spencer*, "Introduction to Social Sciences," Chap. XIV, XV.

amined and discussed them singly, and I shall take notice presently of their observation. But in any event, it is a fact that this theory has been admitted in substance by criminal sociologists, with the exception of those who have asserted that they "do not believe" in the efficacy of the equivalents [1] and of those who have confined themselves to miserable Byzantine discussions as to whether the equivalents for penalties belong to criminal science or to the art of government and politics. This is especially true, not when the doctrine is taken in an absolute sense considered as an universal panacea for crime, but when it is presented, as I have presented it from the beginning, as an orientation and a habit of the legislative and administrative mind, whereby the ancient fetishism of punishment is rejected and whereby, when there is question of facing some phenomena of social pathology, the legislative and administrative wisdom is not limited to the enactment of new penalties or the aggravation of existing penalties, but occupies itself with the search for the causes of these phenomena and attempts to eliminate them, to flush them away and dilute them in order more efficaciously to act upon their consequences.[2]

§ 166. Penal Substitutes.

Let us see some examples. Free trade (aside from the transitory necessities for the protection of a given manufacturing or agricultural industry), since it more readily avoids hard times and abnormal rises in the price of foodstuffs, both of which have so direct an influence on crimes against property, prevents a mass of criminal disorders better than does the Penal Code. On the contrary, the permanent monopoly of certain industries not only multiplies infractions, but foments other crimes against property and against the person, as was seen in Sicily a few years ago when the cultivation of tobacco was restricted.[3]

[1] *Vidal*, "Principes fondamentaux de la pénalité" (Paris, 1890), pp. 469 *et seq.*

[2] *Garofalo*, "Criminalogia," 2d ed., pp. 199 *et seq.*; *Dalle Mole*, "Wagnerismo penale" (Vicenza, 1887), pp. 46 *et seq.*; *Tarde*, "La philosophie pénale," 77 *et seq.*; *De Mattos*, "La pazzia," p. 186; *Marro*, "I caratteri dei delinquenti" pp. (Turin, 1887), Cap. XXVIII; and especially *Lombroso*, "L'uomo delinquente," 5th ed., Turin, 1897), Vol. III, pp. 312 *et seq.* In a recent study by *Richard*, "La responsibilité pénale et les équivalents de la peine," R. P. (September, 1899), the doctrine of equivalents for penalties has received a notable theoretical contribution, precisely "as an application of the synthetic researches of sociology to the art of legislation as a whole."

[3] These words which are found in my first edition (1881), p. 90, had a tragic confirmation in the popular movements of April and May, 1898, brought about

§ 167. Penal Substitutes. Economic Order. Freedom of Emigration.

Freedom of emigration, viewed from this standpoint (that is, disregarding every higher consideration of its natural and social causes), aside from the fact that it is the effect of the conquest of free circulation which capitalists have tried to oppose through fear of scarcity of labor, is also a real safety valve which frees the country from elements easily drawn into crime, through poverty and badly balanced energies. Thus, in Ireland, the decrease of habitual criminals has been due less to the illusory wonders of the penitentiary system than to the emigration of liberated convicts, which increased to forty-six per cent.[1] In Italy, also, studying the criminality of recent years, I have had occasion to indicate among the principal causes for the decreasing oscillations of 1881 and the following years, not only the mild winters and the good crops of these same years but also the extraordinary increase of emigration.

§ 168. Penal Substitutes. Economic Order. Taxation.

Smuggling, which for centuries resisted the most atrocious penalties, such as amputation of the hands, and death [2] and in our day imprisonment and volleys of customs officers, decreases visibly, thanks to the lessening of the duties, as shown in the case of France by Villermé and others.[3] Adam Smith was right when he declared that "a law which punishes smuggling after creating the temptation, and which in making the temptation stronger increases the penalty, is contrary to every principle of justice," and when he controverted Jeremy Bentham who, starting with the idea that the penalty should be heavier in the case of less desirable crimes, advocated the severest penalties for smug-

by the enhancement in the price of bread and by the failure of the crops aggregated by a tariff of seventy-five francs per ton, the highest tariff on bread that has ever existed in the civilized world.

See *Giretti*, "Illusion e danni del protezionismo," G. E. (September, 1898); and in the opportunist sense, *Colajanni*, "Sperimentalismo doganale," in the "Nuova antologia" (1st September, 1898).

For an appreciation of these facts, *Pareto*, "La liberté économique et les événements d'Italie" (Lausanne, 1898).

[1] "Revista di discipline carcerarie" (1877), p. 39; *Beltrani Scalia*, "La riforma penitenziaria in Italia," p. 194.

[2] *Tissot*, "Introduction philosophique a l'étude du droit pénal" (Paris, 1874), p. 109.

[3] *Villermé fils*, "Des douanes et de la contrebande" (Paris, 1851).

gling.[1] A system of imposts, which would reach wealth according to its visible signs (rather than objects of prime necessity), and which would be progressive in proportion to income, would ruin these systematic frauds that penalties have been unable to prevent, and would correct the empirical and exaggerated fiscal system, which is a perpetual cause of resistance to the public power and of outrages and the like.[2] Fregier also speaks of different criminal industries, maintained by the octrois, which would disappear with these imposts, as unjust as they are absurd.[3] So, also, although Allard had stated that the reduction of the duties on articles of prime necessity, aside from its good effects economically, would moreover diminish commercial frauds,[4] the official report of 1872 on French statistics, noting the increase of these very frauds, invoked a more severe repression as a suitable panacea. To this Mercier replied that since these crimes are the result of excessive taxation, the effect cannot be suppressed without suppressing the cause.[5]

§ 169. Penal Substitutes. Economic Order. Public Works.

Public improvements in years of scarcity and in severe winters, by supplying work for the indigent, prevent, unless too long delayed, the increase of crimes against property, the person, and public order. There was a striking proof of this in France in 1853–54–55, a period when, in spite of an agricultural crisis, there was no need to deplore an enormous increase of crimes against property, such as had occurred during the hard times of 1847. This result was due to a provident government which knew how to provide labor in time and on a large scale.

§ 170. Penal Substitutes. Relation of Alcohol to Crime.

Imposts and other indirect restrictions brought to bear on the manufacture and sale of alcohol would be much wiser than imposts on salt and flour, which further impoverish the poorest classes who are most easily drawn to crime. The influence of acute

[1] *Smith*, "Wealth of Nations," Lib. V, Chap. II.

[2] *Bentham*, "Theory of Punishment," Lib. I, Chap. V.

[3] *Fioretti*, "Pane, governo e tasse in Italia" (Naples, 1898); *Pinsero*, "Miseria e delitto," S. P. (June and August, 1898); *Capitan*, "Le rôle des microbes dans la société," R. S. (10 March, 1894).

[4] *Allard*, J. E. (15 September, 1898), p. 188.

[5] *Mercier*, "La justice criminelle et les impôts indirects," J. E. (October, 1854).

and chronic alcoholism (wines and liquors) on the increase of crime is a very serious question. In France, for example (and similar figures might be cited for many other countries), the figures relating to alcohol, crime, suicide, and insanity show an horrible agreement. For the whole of France the annual per capita consumption of wine estimated in 1829 at sixty-two liters, exceeded one hundred liters in 1869; in Paris it rose from one hundred and twenty liters in 1819–1820 to two hundred and seventeen liters in 1872 and two hundred and twenty-seven liters in 1881.[1] Alcohol shows an even greater increase. The individual consumption, which was ninety-three hundredths liters for France in 1829, was three and twenty-four hundredths in 1872 and three and forty hundredths in 1895, with still higher figures in some cities.[2] The manufacture of alcohol (from fruits, grains, beets, etc.), which amounted to four hundred seventy-nine thousand six hundred and eighty hectoliters for the whole of France in 1843, reached one million three hundred nine thousand five hundred and sixty-five hectoliters in 1879, two million and four thousand in 1887,[3] two million four hundred seventy-six thousand three hundred and eighty-seven in 1893, and two million twenty-two thousand one hundred and thirty-four in 1896.[4] As a parallel, we have seen the growth of the number of delicts and crimes in France and the increase of suicides from fifteen hundred and forty-two in 1829 to nine thousand two hundred and sixty-three in 1895. Moreover, I have demonstrated by a special graphical table in the "Archivio di psichiatria" that there is observed in France (notwithstanding certain annual exceptions) an agreement between the increase and decrease of homicides and intentional assaults, and the greater or lesser production of wine, especially in years of great variation. This is noticeable in the years of poor vintage (1853–54–59–67–73–78–79–80), which were followed by a corresponding decrease in crime, particularly in woundings: and vice versa the years of abundance (1850–56–57–58–62–63–

[1] *Caudelier*, "Des boissons alcooliques en Belgique et leuraction sur l'appauvrissment du pays" (Brussels, 1884).

[2] *Block*, "Statistique de la France" (Paris, 1895), II, p. 1405.

[3] *Lunier*, "Comptes rendus du congrès contre l'alcoolisme" (Paris, 1879), p. 135. For later figures, see *Yvernés*, "Des rapports entre l'augmentation de l'alcool et le develloppement de la criminalité et de la folie," "International Congress on Alcoholism" (Paris, 1889), and A. A. C. (November, 1889), and particularly the report of Senator *Claude*, "Sur la consommation de l'alcool en France" (Paris, 1887), with an atlas, a work rich in statistical and legislative data.

[4] "La production annuelle des alcools," R. S. (21 August, 1897), p. 255.

65–68–74–75) were followed by an increase of delicts.[1] It was thus that I then also showed, together with the recrudescence of sanguinary crimes in the month nearest the vintage, the mutual dependance of two phenomena, wine and crime, already indicated by the daily experience that Pierquin, among others, discussed,

[1] Here are the figures which would be more convincing if represented graphically: for wine, they are taken from the "Statistique de la France," by *Block* (11, p. 74), and from the agricultural statistics, "Recoltes de la France"; for alcohol, they are taken from the work of *Lunier*, "La consommation des boissons alcooliques" in the "Journal de la société de statistique de Paris" (Paris, 1878), p. 34: for the delicts, from the annual judicial statistics:

France Year	Alcohol Subject to imports on consumption	Vintage Millions of hectoliters	Affairs (homicides, simple woundings and those which are serious or followed by death) judged by the Assizes.	Affairs (for woundings and intentional blows) judged by the correctional tribunals
1849		35.5	598	13,176
1850	585	4.47	583	14,153
1851	622	39.4	527	13,684
1852	648	28.4	432	13,701
1853	644	22.6	374	12,083
1854	601	10.7	231	9,599
1855	714	15.1	236	9,402
1856	768	21.2	240	10,565
1857	825	35.4	221	11,907
1858	842	46.8	267	14,246
1859	823	29.8	288	14,083
1660	851	39.5	231	12,737
1861	882	29.7	218	13,109
1862	857	37.1	277	14,473
1863	870	51.3	220	15,166
1864	870	50.6	248	16,695
1865	873	68.9	257	17,462
1866	964	63.8	246	17,560
1867	939	39.1	235	16,189
1868	971	52.0	263	17,839
1869	1,008	72.7	295	18,467
1870	882	53.5	261	12,765
1871	1,013		392	12,687
1872	755		315	16,128
1873	934		263	15,829
1874	970		258	17,064
1875	1,010	88.2	276	18,419
1876	1,004	44.7	282	18,908
1877		55.9	228	18,749
1878		49.2	292	18 666
1879		25.9	275	18,424
1880		29.6	298	17,747

and of which the newspapers were full whenever days of plenty brought about a recrudescence of woundings.[1]

Even aside from the annual frequency, the relations between alcoholism and crime are abundantly proved in a way that confirms what Morel says: "That alcoholism produces a demoralized and brutalized class of wretches characterized by a precocious depravation of instincts and abandonment to the most shameful and dangerous acts." [2] I therefore consider that it is useless for me here to enlarge on the data that legal medicine and psychopathology furnish us on the relation between alcoholism and crime as well as the statistical data relative to the number of drinkers recorded in the mass of delinquents and the number of cases of drunkenness and bar-room quarrels recorded by the statistics as the causes of crimes. The causal connection between alcoholism and crime has recently been disputed with statistical arguments. Tammoseo began with the observation that the countries of Europe where the most alcohol is consumed show a less proportion of sanguinary crimes, and he says the same of the several provinces of Italy. But what gives less force to his observations is that he was content to deny that "the abuse of liquor is the most active cause of crime." [3] Afterwards, Fournier de Flaix, maintaining the same thesis with the same statistical arguments and recognizing that "alcohol is a special scourge for the individual who abuses it," came to the conclusion that "alcoholism is not a scourge that threatens the European race," and reasserted that the nations which consume most liquor show a less number of crimes and particularly of sanguinary crimes.[4] Lastly, Colajanni, without citing either Tammoseo or Fournier de Flaix, developed the same thesis, sustaining it principally on the thoroughly compiled statistical data of Kummer. His conclusion is that "there is no regularity, constancy, and universality of relations, in coincidence and succession, between alcoholism, delinquency, and suicide; and, hence, that it is impossible through the laws of statistics to establish a relation of cause and effect between these things." [5] Disregarding the errors of fact contained in the monograph of

[1] *Pierquin*, "Traité de la folie des animaux" (Paris, 1839), II, 369.

[2] *Morel*, "Traité de degenerescence de l'espèce humaine" (Paris, 1857), p. 390.

[3] *Tammeo*, "Il delitto," R. C. (1882), pp. 56, 57.

[4] *Fournier de Flaix*, "L'alcool et l'alcoolisme," R. S. (14 August, 1886).

[5] *Kummer*, "Zur Alcoholfrage, Darstellung der Gesetze und Erfahrungen" (Berne, 1884); *Colajanni*, "L'alcoolismo" (Catane, 1887).

Colajanni,[1] it is sufficient to point out that his thesis is nothing but a gross error of statistical logic.

§ 171. Physical and Psycho-pathogenic Influence of Alcohol.

Our first assertion is that when one concedes (and it cannot be denied) the physical and psycho-pathogenic influence of alcohol not only in liquors, but also in wines (a form in which it is inaccurate to say that the Southern peoples, and in Italy the Southern provinces, are not addicted to alcohol in comparison with northern populations and provinces[2] but only that they are less so), one is unable to explain why alcohol itself, physically and morally harmful to individuals, should not have the same effect on populations which are but the sum of the individuals.[3] As for the argument based on statistics which calls attention to the fact, for example, that there is not a constant and exact agreement year by year, between the figures for alcohol and crime, it is easy to reply: (*a*) That there is never found in any statistical abstract a constant and exact agreement of the figures because the interference of individual, physical, and social causes is inevitable in social phenomena: (*b*) The conclusions drawn from partial disagreements (which are unavoidable, since, especially in biology and sociology, every rule has its apparent exception, due to the action of intervening causes) would be legitimate only if it were maintained that alcoholism is the sole and exclusive cause of crime. As no one has ever asserted such a thing, all of the statistical reasonings of Fournier and Colajanni rest upon an

[1] *Rossi*, "L'alcoolismo in Europa e gli errori di Colajanni," A. P. (1887), VIII, fasc. 6.

[2] Thus, for example, the strong proportion of sanguinary crimes in Abruzzia is explained in part by the popular habit of drinking distilled wines ("vins cuits") with a higher percentage of alcohol, in the same quantities that the neighboring provinces drink ordinary wine. In certain regions of Sicily highly alcoholic wines are used.

[3] According to the data gathered by *Broch*, B. I. I. S. (Rome, 1887), II, p. 389, the annual consumption (of which 95 per cent. is in the form of drink) would average for each inhabitant, in liters of pure alcohol, from 1881 to 1885:

Italy	0.9	Russia	4.2
Norway	1.7	Switzerland	4.6
Finland	2.2	Belgium	4.7
Gt. Britain and Ireland	2.7	Europe (average)	3.3
Austro-Hungary	3.5	U. S. (average)	2.6
France	3.8	Holland	4.7
Sweden	3.9	Denmark	8.9
Germany	4.1		

equivocation and are far from destroying the causal connection between alcoholism (acute or chronic from spirits or wine) and criminality (especially occasional in acute alcoholism with assaults and homicides and habitual in chronic alcoholism, with crimes against property, against the person, criminal assaults, and resistance to the police), although the figures indicating alcoholism as the direct and principal cause of crimes and suicides are relatively weak and certainly below the reality.

§ 172. Alcoholism and Drunkenness.

Alcoholism, like vagabondage and crime, has always existed in various forms: but since 1800 it has become a scourge both general and terrible. This is enough to demonstrate that it is not the effect of the immoral free will of individuals but that it is the reaction and effect of our civilization. Indeed, industrialism is the great cause of alcoholism, since it forces the workmen to an exhausting and overwhelming toil, which impels them to seek the passing and illusory energy afforded by alcohol. On the other hand, it is industrialism itself that produces alcohol so cheaply, in such quantity, and of such quality (and it is more dangerous when made of potatoes and from wood than when made from wine) such as past ages, when alcohol was called the water of life because it was used simply as a medicine, have never known. There existed drunkenness (from wine, beer, cider) but not the alcoholism, which Magnus Huss of Stockholm was the first to describe in 1849–1850. The more or less jovial, bantering, jaunty drunken man tends more and more to make room for the pale, irritable, brutal drunkard. Drunkenness has always existed, as is proved by the legends of the apple of Eve, the soma of India, the mead of Northern Europe (probably cider), which are symbols of fermented drinks. It is thus that an Arab legend speaks of the vine "planted by Adam and watered with the blood of the ape, the lion, and the swine," an evident allusion to the physio-psychic effects of drunkenness. It was also the great vice of the prosperous classes of the Middle Ages. But it practically disappeared through changes in social conditions and the adoption of coffee and tea since humanity has always shown itself greedy for stimulation, even resorting (like the savages) to excessive rythmical dance movements in the absence of fermented drinks. Alcoholism due to liquors (similar to the intoxication from opium, hemp, or morphine) is, in a greater degree than wine drinking, an obvious

cause of physiological, intellectual, and moral degeneracy. Few men of genius have been alcoholic (Avicenne, Byron, Beethoven, Musset, Poe). The most atrocious and the strangest crimes (without any apparent cause or motive) are often but the effect of alcoholism, particularly in epileptics and epileptoid persons. Alcoholism, like every phenomenon of individual and social pathology, has anthropological, physical or telluric, and social factors. The physiological factor which resists every propaganda is seated in the need for excitement which is natural to man and which becomes chronic when the fatigue and organic exhaustion of excessive labor impel him to the consumption of alcohol. For this reason, alcohol is used with advantage in the treatment of certain diseases and during convalescence.[1] The telluric factor is in the climate which with greater or lesser cold produces a variable organic expenditure and impels to drink. In southern countries water is drunk; farther north, wine; still farther north, alcohol; and near the pole, oil and fats.

§ 173. Penal Substitutes. Social Order. Poverty and Fatigue.

The social factor, on the one hand, may be summed up in the two words — poverty and fatigue; on the other hand (among the well-to-do classes), it is found in idleness and the feverish struggle for wealth. These are the causes which render the need and abuse of alcohol chronic and epidemic which otherwise would be intermittent and sporadic. This social factor, particularly in the influence of poverty and fatigue, is the only explanation of the terrible progress of alcoholism since 1850. In some countries, such as Sweden, Norway, Denmark, the British Isles, the United States, this progress is falling off or the consumption itself recedes (liquors are less abused and more beer is consumed); but in other countries, especially in the North of France and in Belgium, alcoholism has taken on truly frightful proportions. At Rouen, for example, it has been calculated from the average consumption of alcohol (excluding children and two-thirds of the women) that the adult men drink every day from a half to three-quarters of a liter of liquor. The average annual consumption, expressed in liters, for each inhabitant (including women and children) in 1893–94 was:

[1] It has been demonstrated, however, that the influence of alcohol consists in a *momentary* and transitory excitation of muscular effort and of the nervous system, succeeded by a paralyzing reaction. See the R. S. (23 April, 1898), p. 536; *Danilewsky*, "Les effets de l'alcool sur l'organisme humain," in the "Journal de la Société russe d'hygiene publique" (June, 1898).

Annual average per capita 1893–94	British Isles	Denmark	Germany	Belgium	France	Italy
Alchohol	4	14	9	9	8	0.7
Beer	136	103	108	182	23	0.8
Wine	1	1	3	3	79	110.

Now, what is to be done in face of this scourge of alcoholism which, with abandoned infancy and vagabondage, is a source of chronic criminality? A multitude of remedies due to private initiative and government action have been proposed and applied; but all descended artificially from the top to the bottom, were imposed by law, and all forgot and continue to forget the social conditions which alone make alcoholism an epidemic scourge.[1]

§ 174. Repressive Remedies.

These are the most common, the easiest, but also the least effective and most stupid. All countries copying England (Acts of 1862 and 1892) have provided coercive penalties against drunkards, sellers of spirits, and makers of alcohol. They have gone so far as to declare the drunkard deprived of the paternal authority. The judges themselves have become weary of sentencing, as has happened in France with the Roussel law, because they see that it is absurd to punish the effects so long as the causes are not suppressed.[2]

§ 175. Relation of Alcoholism and Crime. Fiscal Remedies.

Under the banner of philanthropy and social hygiene, the ministers of finance in all countries have applied themselves to estab-

[1] An excellent collection of data on penal legislation, other legislative measures, the work of private initiative, and the organization of asylums for drunkards, is given by *Vidal*, "Enquête sur l'alcoolisme en Europe et en Amérique," "Rev. pénit." (1896), p. 1268.

[2] In consequence of the habitual fetichism of penalties, the illusion of combating alcoholism with penalties is more or less common to all countries; and everywhere there are repressive sanctions against drunkenness in public. Thus: the (Roussel) law of 23 January, 1873, and Articles 488 and 489 of the new Italian Penal Code, — the law of 10 August, 1872, in England, — the law of 28 June, 1881, in Holland, — of 2 March, 1885, in Luxembourg, — of 19 July, 1877, in Austria, — two laws of 1855 on the manufacture and sale of alcohol and the ordinances of 1871 and 1887, in Sweden, — the law of 16 August, 1887, in Belgium, — the penal codes of Germany (§ 361, No. 5), of Hungary (contrav. § § 84, 85), of the Canton of Tessin (Art. 427), etc. The "Rapport sur la justice criminelle en

lishing and creating imposts on the manufacture and sale of alcohol. In a few countries (like Belgium) reductions in the taxes on wine and beer have recently been enacted (and this is useful in the substitution of a lesser for a greater evil). But taxes have also been reduced on the so-called industrial alcohols which are still sold in the drinking places where they are transformed into more or less drinkable, but doubly toxic liquids.[1] The principal effect of these imposts is to make alcoholic drinks more unhealthful by lowering their quality, and hence more dangerous in poisoning the public, since the social conditions impelling the people to consume liquor remain. It has even been carried to the extent (in Switzerland and in the four eastern provinces of Russia and elsewhere) of a State monopoly of alcohol; but not even that is the remedy for alcoholism. The statistical decrease observed in Switzerland is probably but an optical illusion, because the figures were very inexact before the monopoly. Since the monopoly, the average consumption has remained almost constant from six and two-tenths liters in 1888 to six and three-tenths liters in 1894.[2]

§ 176. Relation of Alcoholism and Crime. Remedies of Regulation.

There are restrictive measures on the sale of alcoholic beverages, — measures which range from absolute prohibition (system of the State of Maine) to the exploitation of the traffic by temperance associations (Gotheburg system),[3] which have employees at a fixed salary, and hence with no personal interest to increase the sale of liquor, but with a profit-sharing interest in the larger sale of health drinks, — coffee and tea. There are other police or fiscal restrictions with the obligation to pay a license for opening a drinking place; legal limitation of the number of inhabitants;

France pour 1887," showing a decrease of prosecutions for public drunkenness (which declined from a yearly average of 81,146 for the period 1873–75, to 67,155 for the period 1881–85, and to 59,098 for 1887), concludes that the decrease of prosecutions does not represent a decrease of drunkenness but only a lesser severity on the part of the authorities (Paris, 1889, p. xxxviii).

[1] For France, see *Meilhon*, "Legislation relative à l'alcoolisme," A. M. P. (April, 1895); and for Italy, *Celli*, "Alcoolismo e fiscalismo in Italia," in the "Rinnovamento economicheo amministrativo" (July, 1895).

[2] Nevertheless, the monopoly seems to be the least evil of the fiscal remedies especially when as (recently proposed in Belgium, after a similar example afforded by Norway) the profits of the monopoly are employed by the terms of the law in the betterment of the material and moral condition of the lower classes.

[3] *Wieselgren*, "Résultats du système de Gotheburg" (Stockholm, 1898).

obligation imposed on hotel and saloon keepers of paying indemnity to the families of drunkards to whom liquor has been sold when they were already drunk; the exclusion from membership in labor associations of persons who drink to excess. The imagination can invent hundreds of measures of this kind, but the effect is always the same. Even the number of places of sale has no appreciable influence on the consumption of alcohol. In Holland, for example, there is a place of sale for each one hundred and ninety-two inhabitants and in Belgium, one for every thirty-five; and yet the average consumption is about the same (nine liters) in both countries.

§ 177. Relation of Alcoholism and Crime. Psychological Remedies.

These have their utility since they tend to spread total or partial abstinence, through a propaganda in the schools, churches, popular associations, and committees. We have the example of Father Matthew in Ireland, in 1847, — after which, however, the Irish drank ether, arguing that Father Matthew preached only against the use of gin. There are also, particularly in Anglo-Saxon countries, temperance societies, generally composed of women who employ all sorts of means of propaganda from lessons in the elementary schools to grotesque and discordant orchestras playing before the bars and places where liquor is sold. But these remedies represent an enormous (though admirable) expenditure of energy and effort to obtain very slight and uncertain results which cannot cope with the terrible and incessant influence of the social conditions, favorable to alcoholism. It is always useful, however, to make a propaganda against alcoholism, like that carried on by the Belgian socialists where the "stores of the people" do not sell liquor. For, it is certain that if people are convinced of the evils produced by alcoholism, this conviction will favor the very influence that improved social conditions can exert.

§ 178. Relation of Alcoholism and Crime. Therapeutic Remedies.

Aside from the houses of forced reclusion for delinquents in a state of habitual drunkenness,[1] there are free drunkards' asylums,

[1] There was in England the Habitual Drunkard's Act of January, 1880 (reviewed in A. H. P., Nov., 1882); and it has been imitated in an incomplete way (as is our habit) and without practical application by Art. 48 of the Italian Penal Code.

tried for the first time at Lintorf, in Prussia (1891), later in America, England, Austria, and Switzerland.[1] But these establishments, unless the efforts of serotherapy against alcoholism should succeed,[2] are of very limited efficacy, because they can only serve a few hundred of individuals of the more comfortable classes while drink is a scourge that smites millions of men. All of these remedies can be but transitory and of limited efficacy, since for alcoholism (as for neglected childhood, vagabondage, and, hence, for crime) there is only one remedy. It is the social remedy, *i. e.* the raising of the standard of the life of the people (shorter hours of labor, better wages, more attractive family life, healthy amusements, such as theaters in place of saloons and drinking places, and so on). As to the well-to-do classes, they will be cured of alcoholism when they shall have been cured of the mania for wealth which makes the struggle for existence feverish and sad and which always urges to the mania for theft under every form of fraud. It is only through a new orientation of society and, hence, of political and moral conditions, that we shall see the disappearance of alcoholism, that terrible source of crime, against which during the period of transition it is none the less necessary to bring to bear the organized mass of the less illusory of the remedies which we have mentioned.

§ 179. Penal Substitutes. Economic Orders in General.

Let us continue the enumeration of the equivalents for penalties. The substitution of a metallic coinage for paper money singularly reduces counterfeiting, which has resisted the maximum sentences to hard labor. It is easier for most people to detect a false coin than a counterfeit bill.[3] The commerce in money and precious metals has had a greater influence than penalties, on the increase

In Switzerland, the penal codes of Berne (Art. 47), of Neuchâtel (Art. 204), and a law of St. Gall (May, 1891), and Art 28 of the draft of the Swiss Penal Code regulate these asylums for drunkards. Drafts of laws have been submitted in Germany (1894), and in Norway (1896).

[1] *Ladame*, "De l'assistance et de la législation relative aux alcooliques." Report to the "Congrès des médecins alienistes," at Clermont-Ferrand, 1894.

[2] *Id.*, the "Revue des Revues," 15 Dec., 1898, p. 647, and 1 Jan., 1899, p. 103.

[3] Crimes against the currency are less in the total of convictions for crime in France and Belgium than in Italy where the use of paper money is more general. Special statistics for criminal prosecutions in Italy for uttering and circulating false bank bills from 1866 to 1878 are found in the "Annales de statistique" (1880), Vol. 15, pp. 311 *et seq.*

and decrease of usury. Spain experienced this after her American conquests,[1] and it is proven also by the history of penalties in the Middle Ages, which did not prevent the continual reappearance of usury under the forms of various devices such as "anacorisme," the "contrat mohatra" and the tri-lateral contract. In our own times, institutions of popular and agricultural credit, and rural banks and similar economic (but not penal) measures would be much more effective against usury than the exceptional laws of repression enacted a few years ago in Germany, Austria, and Hungary.[2] Again, if the ratio of interest of public securities were lowered the current of capital would flow into commerce and industry and thus would be prevented the crimes of bankruptcy, fraud, forgery, which are, at least in part, the consequence of an insufficient flow of capital. In like manner, against the crimes of the banks and panamism,[3] economic measures dealing with speculation, the stock exchanges, and the regulation of the banks, etc., would be more efficacious than the Penal Code which is always inadequate against "malefactors of great wealth." [4] Salaries proportionate to the needs of public functionaries and to the general economic conditions will cope with speculations and corruption generally due directly or indirectly to money difficulties. Limited hours of service in the departments, on which public safety depends, will prevent more disasters than prisons with which those guilty of involuntary homicides are threatened. An example is the collision between trains which happened near Milan in September, 1881, by reason of an overworked railway employee who had fallen asleep; a prison sentence (I am unable to say whether more unjust than it was useless) did not prevent it. The development of good roads, metalled highways, economic railways, tramways, and the concentration of inhabited centers, cause the diappearance, as Despine and Lombroso remark, of the association of malefactors and bands of criminals, at the same time making acts of brigandage and armed robbery rare.[5] The distribution of wood during the severe winters in

[1] *Montesquieu*, "L'Esprit des lois," Lib. XXII, Chap. VI.

[2] *Vidari*, "Di alcune nuove leggi contro l'usura," in the "Annuario delle scienze giuridiche" (Milan, 1881); *Morpurgo*, "La criminalità nei contadini del Veneto," in the "Atti della giunto per l'Inchiesta Agraria" (Rome, 1882), IV, fasc. I.

[3] The author probably means stock-jobbing of the French Panama order.

[4] *Laschi*, "La delinquenza bancaria" (Turin, 1899).

[5] In Sicily, for example, brigandage thrives not only from favorable ethnic and social conditions but by reason of very poor roads.

the poor villages was tried by Cardone, the King's procurator at Bergane, and he thus opposed rural robberies with a much more efficient obstacle than that of gendarmes and jails. So, also, the construction of houses and wide streets, the extension of street illumination, the suppression of ghettos and other sordid quarters, the establishment of night refuges,[1] are better for the prevention of burglaries, robberies, assaults, and the receiving of stolen goods, than all the agents of public safety. We read, for example, in the diary of Roncalli,[2] that in 1852 "by order of the pontifical government four great lights were placed in St. Peter's Square, and this measure was taken to prevent villainies. It was notorious that many persons went to the Square of St. Peter on dark nights to commit acts contrary to good morals." Many robberies and other crimes would be prevented if all of the houses were so constructed that in order to reach the apartments one must pass the lodging of the concierge. In many cities the use of a safety chain on the doors of apartments is an effective obstacle to burglaries and robberies. The use of the Roentgen Rays in the examination of baggage, already tried in France, prevents the myriad of frauds on the revenue and local imposts which even "honest people" often commit, and sometimes as a protest against vexatious laws. Cheap workingmen's houses, and in general, sanitary police regulations seriously applied to both city and country dwellings, by preventing the excessive huddling together of poor families, would improve their physical hygiene, and at the same time avoid a mass of immoral and guilty acts.[3] Coöpera-

[1] For instance, Rowton House, in London, (see the "Scuola positiva," July, 1898), which it has been attempted to imitate, on a worthy initiative, in the creation of an "albergo popolare" in Milan.

[2] *Roncalli*, "Cronaca di Roma dal 1849 al 1870."

[3] *Brouardel*, in his commentaries on *Hofmann's* "Nouveaux éléments de médecine légale" (Paris, 1881), pp. 726 and 721 writes: "Very often, it is on their sons and daughters that the accused have committed criminal assaults." *Tardieu*, in "Attentats aux mœurs," speaks of incests between brothers and sisters provoked by the same cause. And to the same effect is *Annechino*, "Incestuosi d'occasione," in the "Anomalo," Sept., 1898. *Du Mesnil*, "L'habitation du pauvre à Paris," in the "Annales d'Hygiène publique" (Jan., 1883), records that in five arrondissements of Paris, while the number of popular lodging-houses increased from 2,621 in 1876 to 3,465 in 1882 (32 per cent.), the number of persons in these tenements rose from 42,821 to 82,380 (95 per cent.). *Bex*, "Logements ouvriers en Allemagne" (*id.*, Aug., 1882), says that six and even eight lodgers crowd into a small room with the proprietors and "it is said that in Rhenish Prussia the lessor not only permits the adulterous relations of his wife with the lodgers but stipulates in the contract, in a more or less disguised way, for a special compensation." See, also, the investigation of workingmen's habitations by *Freese*, "Wohnungsnot und

tive and Mutual Assistance Societies, Provident and Old Age Funds, Funds for disabled workmen, Civil Liability of employers and masters, better and more promptly applied in industrial accidents, commercial and savings banks for the people, Committees on Employment, giving assistance in the form of labor, — would also, better than the penal code, prevent a multitude of occasional crimes against property and the person. In this connection I have stated in Parliament that the reform of the Pious Works should place in the hands of the government and of its administrators an immense force with a capital of two milliards, in the prevention of a great number of crimes if good use were made of it. Also all of the measures suited for the prevention of begging and vagabondage are but equivalents for penalties in the crimes which in general are not serious but are very frequently committed by vagabonds and beggars. These measures should use jails as little as possible and should exist in agricultural colonies, as in Holland, Belgium, Germany, and Austria.

§ 180. Vagabondage and Crime.

Together with alcoholism and neglected childhood, vagabondage, generally accompanied to some extent by begging, is an abundant source of crime, constituting, as it does, an intermediate zone between the unemployed and the criminal. The essential characteristic of vagabondage is not idleness. Its specific characteristic is rather lack of domicile (which, however, tends to disappear as an attribute of vagabondage) and the lack of the means of existence which is its predominant note. There are idlers both with and without fixed domiciles who are not legally speaking, vagabonds, since they do have means or fortunes even, and yet who live without working. Like every other phenomenon of social pathology, vagabondage has its anthropological factors (a kind of biological debility, of neurasthenia or psychasthenia, which cause an invincible repugnance to all methodical work and which may even become pathological forms of ambulatory autom-

Asatzkrisis," in the "Jahrbuch für Nationaloek. und Statistik," 1893, p. 661; and *Booth*, "In Darkest England" (London, 1894). This situation which recalls the sexual promiscuousness of certain savage tribes noted by *Letourneau* in "La sociologie d'après l'ethnographie" (Paris, 1880), pp. 53–58, is the infamous mark of our civilization in the poor quarters of the richest cities, even in our country, for which it is only necessary to mention the "bassi" and the "fondaci" of Naples, described by Villari, Mario and many others, which under other names, but with little fundamental difference, are found in all the large cities.

atism);[1] its physical factors (principally the climate, which, if mild, makes life alimentative and sleep easier); and its social factors (working conditions more or less assured to every healthy adult man). In order to understand the relation between vagabondage and crime and to indicate the remedies, one should retrace its evolution guided by the excellent study made by Florian and Cavaglieri.[2] While crime is the indirect reflection of social and economic conditions, vagabondage is their immediate reflection. Vagabondage was a perfectly normal fact in its primitive phase during the thousands of centuries when nomadic humanity lived from the chase, fishing, and grazing. When, however, primitive humanity passed into the agricultural stage (with the economic and social institution of slavery) the attachment of man to the soil becomes a social institution which involves the prohibition of emigration, and vagabondage then becomes anti-social. Fugitive slaves were really the first vagabonds, pursued and punished as delinquents. They became more and more numerous until the decline of slavery changed nearly all of them into an overflowing horde of vagabonds, to which the monasteries and the juridical institution of serfdom[3] opposed but an inadequate resistance. In the first half of the Middle Ages, during the communal period, the communes became more and more the refuges for serfs who had escaped. Thus infant industry substituted the urban servitude of the shop for the rural servitude of the soil. In the second half of the Middle Ages, the spread of commerce, the frequent wars (which transformed soldiers of fortune into vagabonds and brigands), and even the mendicant orders (founded by Francis d'Assisi), gave a new extension to the phenomenon of vagabondage, which reached its crest during the two hundred years between 1500 and 1700. During this period, which precedes the formation of great industrialism, the progressive concentration of landed property took place, and the peasants were driven from their land, which was turned into pastures and parks. "Sheep have eaten the men," was heard in England, whose laws against vagabondage were cruel to the last

[1] *Pitres*, "L'automatisme ambulatoire," in the "Revue des Revues" (1 May. 1896); *Astor*, "Le vagabondage pathologique," in the "Rev. pénit." (1896), p. 547; *Drewarte*, "De l'origine epileptique de l'automatisme," in the "Progrès medical" (1895), 46, and A. M. P. (November, 1898), p. 465.

[2] *Florian* and *Cavaglieri*, "I vagabondi," in the S. P. (May, 1894), and Vol. I (Turin, 1897); Vol. II (Turin, 1900).

[3] "Servitude de la glèbe."

degree. And yet vagabonds were only peasants without employment, because of the change in rural development through the spread of great pastures and of landlordism, which also was established by usurping the communal lands for private profit, after dispossessing the proletariat. In this period modern industrialism began with the necessary accompaniment of two social phenomena: the mobility of the workman (who could leave one shop for another, or go from one province to another) and the army of unemployed necessary for the maintenance of wages at a level advantageous to the capitalists. Then, since 1500, we see the national and international immigrations and emigrations of workmen and peasants becoming more and more frequent and considerable. In turn, the unemployed became numerous, following in this the progress of machinery, and they are the victims of over-production and under-consumption. There was a sad and living sign of this state of social pathology when Coxey's Army, one hundred thousand strong, marched on Washington from all parts of North America. Lawmakers have adopted preventive and repressive measures, always penal, against vagabondage. The Belgian law of 1891 (modified by the law of December, 1896) is a very remarkable example with its classification of vagabonds as vicious and chronic (interned in the almshouses), occasional vagabonds (interned in the houses of refuge), and juvenile vagabonds (interned in charitable settlements).[1] The purpose of this law was the substitution of surveillance for punishment; but the law actually answered this purpose very incompletely, since vagabondage is beyond law of repression and preventive police. It tends to become normal again, as it was in primitive humanity, thus giving a new instance of the law of apparent regression.[4] The journeys of the rich, of merchants and workingmen, increase with the development of industry. In England, for example, there is a yearly average of seven hundred and seventy-five million travellers, while in Russia, with four times the population, it is only thirty-eight million. It is impossible, therefore, for penal laws to suppress or even diminish the phenomenon of vagabondage, which, by again becoming normal, tends to separate from atavistic or ordinary criminality and more and more to approach evolutionary or politico-social crime. Some countries have substituted in place of penal and police regulations economic

[1] *Le Jeune,* "I vagabondi nel Belgio," S. P. (1894), p. 351.

[2] See *Ferri,* "Socialismo e scienza positiva," 2d ed., and P. III, *post.*

measures such as labor settlements for the unemployed, houses of refuge, and relief-stations for neglected childhood and travelling workmen, as in Germany.[1] Furthermore, the only radical remedy for vagabondage, as for alcoholism, must be a new economic organization, which, by suppressing the causes of unemployment and vagabondage (except the isolated and rare cases of pathological vagabondage), will be able to suppress its more or less demoralizing and crime-breeding effects. When the socialization of labor (with the socialization of the means of production) gives every man not only the right but the duty of labor, vagabondage, in its present epidemic form, will be no longer possible.

§ 181. Penal Substitutes. Economic Order. Conclusion.

As to the economic order, it may be said that a sagacious social legislation, not restricted to innovations of form rather than substance, and seriously applied, would constitute (and England to-day gives evidence of it) a real code of equivalents for penalties, which could advantageously cope with the totality of criminal impulsions that determine the abnormal economic conditions of the most numerous classes.

§ 182. Penal Substitutes. Political Order.

In the prevention of political attempts, regicides, revolts, conspiracies, and civil wars, where penal repression and empirical police prevention are powerless, everything is possible to a national government with regard for public liberties.[2] To prevent the so-called crimes of the press, which under other names resisted the stake of the Middle Ages, penalties, which only added fuel

[1] "Le stazioni di soccorso per operaji in Prussia," in the "Rivista di benificenza pubblica" (February, 1896); *De Palligny*, "Gli asili notturni a Parigi e l'assistenza per mezzo del lavoro," *id.* (February, 1898); *Ruspoli*, "Les 'Rowton houses' a Londra," S. P. (July, 1898); *Oubert*, "Des moyens de prévenir et de réprimer le vagabondage et la mendicité," a study in comparative legislation (Dijon, 1898); *Robin et Drion*, "Rapport sur les mesures, soit d'assistance, soit de répression, à l'égard des mendiants et des vagabonds," B. U. I. D. P. (1894), IV, pp. 342 and 347. The subject was discussed at the session of the International Union for Penal Law, at Paris (1893), but no conclusions were reached. See the discussion in the B. U. I. D. P. (1894), IV. pp. 376 *et. seq.*; *Crisenoy*, "Rapport sur la suppression du vagabondage," in the "Rev. pénit." (January and April, 1898); *L. Rivière*, "Le vagabondage et la police des campagnes," *id.*, 1898, p. 498.

[2] *Ferri*, "Contro l'utopia reazionaria," a parliamentary speech in "Una campagna ostruzionista" (Milan, 1900).

to the fire and which are odious when inflicted on honorable men, can advantageously be replaced by full liberty of opinion, permitting society to expand less violently, and giving it a less unstable equilibrium. This was recently proven in France during the grave political and anti-militarist agitation caused by the Dreyfus case. Respect for law spreads among the people less because of police and jails than because of the example given by persons in high places and by the authorities themselves, when they are the first to put into practice respect for individual and social rights and strict application of the law to any one who violates it, thus avoiding the scandals of impunity for the big thieves and the most iniquitous severity for the little ones.[1] Of what use would a penal code be against election frauds and other crimes? The sole remedy is a good electoral reform which, by being in harmony with the needs and tendencies of the country will prevent, instead of inciting, material and moral disorders. In the prevention of political crimes in general (beyond the economic measures already indicated which are appropriate to make less miserable the life of the most numerous social classes) and better than the Penal Code would be political and parliamentary reforms, which by making the legal representation really more representative of the country, would take from the assemblies the occasions and forms which favor abuses or destroy their power. They would remove the injurious influence of political preoccupations on technical questions and, further, would give to the whole people a more direct participation and authority in public affairs, for instance, through the referendum or similar means.[2] Finally, epidemic crime, such as the Camorra and the Maffia,[3] which proceeds from the fact that the needs and the particular characters of different parts of a country are not satisfied and understood where there is variation of climate, race, traditions, language, customs, and interests, would disappear for the greater part, if the metaphysical mania for political symmetry, centralization, and despotism were renounced. National unity has nothing to do with legislative and administrative uniformity, which is only its pathological exaggeration. It is natural that laws which actually represent only

[1] *Laschi*, "La delinquenza bancaria."

[2] *Lombroso* and *Laschi*, "Delitto politico," pp. 467 *et seq.*, have proposed a real code of equivalents for penalties in the economic and political prophylaxis of political crime.

[3] *Allongi*, "La Maffia" (Turin, 1887); "La Camorra" (Turin, 1890), Cap. VII.

a means of compromise between moral, political, and economic necessities, quite different in different regions, should almost always be ill adapted to social needs, too narrow and backward for one part of the country and too broad and premature for another, like the clothing issued to conscripts which is too small for the big men and too large for the little ones. Administrative federalism together with political unity ("e pluribus unum") would effectuate a real code of equivalents for penalties, as England again has demonstrated with its lively local autonomies.[1] It would restore to each part of the social organism the relative liberty and independence of movement which is a universal law of biology and sociology (since every living organism is but a federation of divers elements) and which is stifled and atrophied by the leaden cloak of a uniformity that in Italy has been the inevitable reaction of her recently reconquered unity, and threatens in time to become more unbearable and more fatal to the very national unity which it is thought to strengthen by such means.[2]

§ 183. Penal Substitutes. Scientific Order.

If civilization has introduced new instruments of crime, firearms, the press, photography, new poisons, dynamite, electricity, hypnotism, and microbe infection, science itself, sooner or later, introduces new antidotes much more effective than penal repres-

[1] *Bertolini*, "Il governo locale inglese e le sue relazioni colla vita nazionale" (Turin, 1899), Vol. II.

[2] Apropos of the uniformity of penal laws which was one of the strongest political motives for the approval of the new Penal Code, and which was a symbol of national unity, could not and should not have been avoided since it is only the exaggeration of the unity which can bring about a reaction in the federalist sense as shown in France and Italy to-day. *Carrara*, "Lineamenti di pratica legislativa penale" (Turin, 1874), p. 393, maintained that it is unjust and useless to submit different provinces to the identical penal law; in this he was guided by his concern lest the death penalty be restored in Tuscany, as had been proposed at a certain time.

On the contrary, the positive school from general reasons of sociology concurs in condemning legislative uniformity. Thus, *Garofalo*, "Criminalogia," p. 201, agrees with the observations which I have just made and which were later developed by Lombrosi and *Rossi*, "Sul regionalismo in Italia," in the "Appunti al nuovo codice italiano" (Turin, 1889), 2d ed., pp. 62 and 85. To the same effect, *Lombroso* and *Laschi*, "Il delitto politico"; *Niceforo*, "L'Italia barbara contemporanea."

In France the same order of ideas is sustained by *Donnat*, "Politique expérimentale" (Paris, 1885); *Bordier*, "La vie des sociétés" (Paris, 1887), I, Chap. XVIII; *Desmoulins*, "A quoi tient la supériorité des Anglo-Saxons," (Paris, 1897); *De la Grasserie*, "L'État fédératif" (Paris, 1897). For Spain, see *Pi y Margall*, "Les nationalités" (Paris, 1879).

sion. The press, photography, anthropological measurements of prisoners, graphology, Roentgen rays, telegraphs, and railroads give powerful aid to honest citizens. Necroscopists and toxicologists prevent poisonings. It has been already shown that the invention and general use of the Marsh apparatus has rendered less frequent the formerly numerous poisonings with arsenic, by facilitating the proof.[1] A kind of Marsh apparatus is now suggested for written forgeries, whereby the suspected documents are subjected to the fumes of iodine, a process which reveals the erased and newly-written characters.[2] The practice of medicine by women will suppress many of the occasions of crimes against morals and the family. The free discussion of any idea, by obscuring the halo of certain seductive theories will prevent their inconveniences better than more or less scandalous processes. Piracy, which resisted all the penalties of the Midde Ages, disappeared with the use of steam in navigation. The use of personal letters of credit by making useless the frequent transportation of currency is better adapted, than are penalties, to the prevention of thefts with or without violence. To prevent forged signatures on letters of credit, it is proposed that there be a certificate of authentication, given by an employee of the bank or commercial house, who shall state that he has seen the real debtor sign it.[3] In some banks, automatic instantaneous photography is used to record the features of persons who come to the windows to bank considerable sums. We might further mention the mechanisms against thieves, such as safes, safety locks, and alarm systems. It has been recognized that in preventing railway murders, alarm signals and the different systems of inside locking placed in the cars for the use of passengers, are worth more than the galleys.

§ 184. Penal Substitutes. Civil and Administrative Order.

A sagacious testamentary legislation is better than a penal code in preventing murders caused by the desire to inherit. Consider, for example, the testamentary powers in France since 1800. Suitable provisions with respect to the capacity of paternal

[1] *Carrara*, "Programme," § 1184, note 1, calls attention to the fact that poisonings have beeome rarer rather on account of the progress of chemistry which reduces the chances of impunity, than on account of the severity of the penalties.

[2] *Bruylants*, "Altérations frauduleuses des écritures," R. S. (17 January, 1891).

[3] "Credito e cooperazione" (Rome, 1 November, 1890).

consent to the marriage of children, to which Herschell [1] drew attention, in connection with the countries where the consent of both father and mother is necessary, and the necessity of carrying out promises of marriage and of supporting the children born of a seduced and abandoned mother, are excellent antidotes against concubinage, infanticide, abortions, criminal assaults, and homicides caused by the undeserved abandonment of women.[2] Bentham said in this connection that a legally tolerated and regulated concubinage would be less harmful than that which the laws do not recognize and are unable to prevent.[3] The facility of civil justice and its quasi-inexpensiveness and, hence, a greater development, under prudent safeguards, of the institution of justice of the peace, would prevent attempts against public order, against the person, and against property. In Italy, a reform with a recoil was introduced when a great number of the prefectures were abolished, which in the distant centers were the only sign of civil life, and by aiding the administration of justice prevented retaliation, the arbitrary exercise of personal rights, and affrays. So, also, an advocate for the poor replacing the derisive services of our unpaid perfunctory attorneys, would make the defense of invaded rights and interests effective, easy, and prompt, and in constituting a sort of judicial tribunal with authority equal to that of a Public Ministry, but with a popular character, would

[1] *Herschell*, "Théorie des probabilités," in the second edition of *Quetelet*, "Physique sociale."

[2] *Tissot*, "Introduction à l'étude du droit penal"; *Giuriati*, "Le leggi dell' amore" (Turin, 1881); *Rivet*, "La recherche de la paternité" (Paris, 1890), rightly insisted on this reform, if only for its preventive effects against the revenge of girl-mothers, although he relies too much on sentimental arguments as *Sighele* says in the "Archivio di psichiatria" (1890), XI, 570. *Dumas*, in the preface to Rivet, disabusing himself of his famous little work on the subject, has placed in doubt the utility of this measure, which according to some would increase illegitimate births (see *Masé Dari*, "Ricerca della paternità e noscite illegittime," "Archivio psichiatro," XI, 56); but aside from reasons of social justice which require that every one shall be responsible for his acts, it is certain that proof of paternity, under safeguards to prevent its abuse, would prevent murders, infanticides, and abandonment of infants, which are really a greater evil than the possible illegitimate births. Proof of paternity is in all cases forbidden by the codes of France, Belgium, and Holland, and of the cantons of Geneva, Tessin, and Neuchâtel. It is permitted in all cases by the codes and laws of Austria-Hungary, Sweden, Portugal, England, the United States, Baden, Bavaria, Prussia, Saxony, and a large number of Swiss cantons. It is permitted in Spain, except in the case of adultery and incest. It is forbidden, except in the case of abduction or rape, in Italy, Bolivia, and Serbia. Russian legislation does not treat of it.

[3] *Bentham*, "Treatise on Legislation," Part IV, Chap. V; *Carrara*, "Opusculi," IV, op. 10.

be an excellent preventive remedy against a mass of vengeances, vexations, and abuses. A remedy will also be found in a strict and expeditious system of reparation to the victims of crime, a system to be considered as a social function confided to the public ministry in cases where the persons injured do not know or are unable to validate rights too often neglected.[1] The simplification of legislation will prevent many frauds on citizens, who, despite the legal presumption that ignorance of law is no excuse (while in reality, there is no one who knows all the laws of his country), cannot know the whole intricacy of promulgated laws wherein there are pretexts for so many citations and spoliations.[2] Commercial laws on the civil responsibility of administrators, on bankruptcy procedure and practice, on industrial detective exchanges for information and vigilance, are better preventives of fraudulent failures than hard labor.[3] Juries of honor, legally recognized and encouraged, could oppose a more serious obstacle to the duel than ridiculous penalties.[4] A well-

[1] See P. IV, *post.*

[2] *Spencer*, "Essays — Too Many Laws," II.

[3] *Filangeri*, "Scienza della legislazione," Lib. II, Cap. XXIV; *Ferrario*, "I fallimenti" (Milan, 1879); *Longhi*, "La bancarotta" (Milan, 1898), pp. 229, 230.

[4] Duelling, which, in spite of the death penalty, torture, and the Draconian edicts of Charles IX, Henry II, Louis XIII, and Louis XIV in France (examples followed elsewhere), flourished in the past centuries, has almost disappeared in Europe, now that the penalties are so reduced, and is unknown in England, due solely to public opinion. In the France of to-day it is not noticeable that they increase remarkably when the jury leaves them unpunished; nor do they become more rare when the jurisprudence profits by the silence of the Code on this question, to assimilate them to voluntary homicides. And yet some people in France imagine that a special law (offered 3 Dec., 1889, by the Deputy Cluseret) could offer an efficient remedy. The habit of considering punishment as the only remedy for crime is so deep-rooted that not only did *Schopenhauer*, in his "Aphorismus," suggest the infliction of a dozen blows with a rod in the Chinese fashion for every one who sends or accepts a challenge, but even the drafts of the Italian Penal Code increased the penalties for duelling; the Senator Chiesi would have made them still more severe in accordance with the inveterate illusion that the frequency of delicts comes from the mildness of the penalties (Actes du Sénat, Legisl. XII, Vol. II, p. 1078). These provisions, thanks to the fines with which duelists are menaced, constituted a less ridiculous sanction against this delict. But the detention imposed is illusory since the remedy is entirely outside of the Penal Code. Vigliani had suggested that the effects of the duel, if it had not first been submitted to a jury of honor, should be punished like ordinary homicides and woundings; in this way the law would have the advantage of in some degree encouraging juries of honor; this provision was, however, suppressed in later modifications. It seems to me that it would be more useful to say: Duels which a jury of honor has declared unavoidable are not punishable. The duel which in serious cases, among the Latin and Germanic peoples, cannot be prevented by the fear of punishment alone, would serve in turn, when favored with this conditional im-

organized notarial system combats documentary forgeries and frauds in the same way that Bureaus of civil status have almost caused the disappearance of falsification relative to persons and the substitutions and suppressions of children, so frequent in the Middle Ages.[1] And if, as the Deputy Miquelin proposed, there were written on the birth register of every person his civil status, many bigamies could be avoided, since it would appear upon the birth certificate of the person desirous of marrying without any further investigation, whether he were free to marry or not.[2] A more intelligent medical examination of conscripts for nervous and morbid ailments would prevent a number of crimes which are often very serious, such as misdéism. Carrara[3] remarks that a great number of calumnies and false denunciations are avoided by public accusatory process. The foundling homes, orphanages, or still better, some of the belated successors of these institutions, maternity wards and aid at home for girl-mothers, can prevent many infanticides, abandonments of infants, and abortion, which resist the severest penalties. By putting an end to the crowding of prisoners, by abolishing the so-called remedies of admonition, surveillance, and forced domicile, by suppressing the pitiable absurdity whereby the prison is preferable, in point of comfort and diet to the garret of the honest workman or to the cot of the field laborer, — there would be a reduction in the number of crimes which are often committed by the unfortunate in order to find food and covering in prison and to escape the vexations of police surveillance. Prisoners' aid societies for liberated convicts, and especially those for juveniles, can usefully replace penalties, although of less efficacy than is generally believed. They have against them the thought that it

punity, to take the place of penalties for sanguinary affrays and revengeful assassinations, which are only too frequent in some regions: it would be a relative improvement in comparison with these brutal acts of violence. See *Zani*, "Il diritto secondo la legge di evoluzione" (Mantua, 1881), p. 27; *Berenini*, "Sul duello," A. P., V. 2, 1884; "Offese e difese" (Parma, 1886), pp. 49 *et seq.*; *Tessier*, "Du duel" (Lyon, 1890).

For my own part I think that I have done something more efficacious against the duel by giving the example on several occasions of declining, without much regard for chivalrous ceremony, challenges which were sent me by two deputies. The history of England from 1800 to 1850 proves to us that a courageous example in high places is the best way to deprive the duel of its barbarous halo and make this sufficiently grotesque and often indirectly criminal custom fall into disuse.

[1] *Ellero*, "Opuscoli criminali" (Bologna, 1874), pp. 62, 77.

[2] A. A. C. (15 July, 1886), p. 383.

[3] *Carrara*, "Opuscoli," Vol. IV, p. 291.

is better to protect liberated convicts than honest unemployed workingmen, to whom the convicts are preferred. Further, until the present they have made no distinction between born-criminals and delinquents through occasion or passion, and they heap their benefits, be they ever so slight, on all liberated convicts alike, even the incorrigible, and often with either police or anti-preventive formalities. This explains why, in spite of so many platonic declarations and other proofs of a boundless philanthropy, administered under the forms of direct charity (which is less useful than indirect), these societies of patronage do not prosper in any country. Even in England, where they are more flourishing than elsewhere, their action is really insignificant, in face of the evil whose extension they seek to prevent.

§ 185. Penal Substitutes. Religious Order.

History and criminal psychology bear witness that a corrupted religion foments criminality. We have examples of this in ancient Rome and the Rome of the Middle Ages (with its apostolic tariffs for the absolution of sins [1]) and in the religious sects of America and Russia of our own day. Religion, even when it works for the common good and not for the profit of a caste, can offer only a transitory obstacle to crime as did the exhortation of Savanarola at Florence and of Father Matthew in Ireland. It cannot exercise any inhibitive function against the atavistic tendencies of born-criminals and habitual criminals, being limited to an ulterior sanction of the moral sense, which seems effective when the believer has a moral sense but which drops into nothingness when the moral sense is absent or atrophied. The prohibition of processions outside of churches besides insuring the respect due to the convictions of all, prevents disorders and riots. The suppression of monasteries and convents removes a focus of criminal assaults and begging. The diminution of the luxury of churches removes a strong incentive to the theft of precious objects. The abolition of pilgrimages to certain shrines prevents many crimes against good morals, the person, and property. The marriage of the clergy would avoid many infanticides, abortions, adulteries, and criminal assaults.

[1] *Saint-Andre*, "Les taxes de la pénitencerie apostolique" (Paris, 1879); *Ferri*, "Il sentimento religioso nei delinquenti," A. P., V. Q, and "L'Omicidio," Cap. VI. In a contrary and reactionary mood see *Garofalo*, "L'educazione popolare e la criminalità in Italia," a lecture delivered at Rome, 1896.

§ 186. Penal Substitutes. Family Order.

Divorce prevents many bigamies, adulteries, and homicides. Aside from all of the moral and civil consideration which clearly militate in favor of divorce, it is readily seen that from the standpoint of crime, where the indissolubility of marriage does not permit the legal severance of a bond which has become unbearable, the temptation to sever it by criminal means often becomes irresistible.[1] By giving preference to married men in certain civil and military functions, many abuses would be avoided, thanks to the salutary thought of the family. By requiring the civil marriage to precede the religious ceremony, many crimes of bigamy, infanticide, murder, and assault through revenge, would be avoided. The prohibition of marriage for certain persons would diminish the multitude of delinquents by avoiding as much as possible the fatal inheritance of crime. An intelligent regulation of prostitution, while protecting the rights of accidental prostitutes driven to the evil through the corruption of environment and by the abuse of the police power, would, at the same time, protect society against prostitutes with a congenital tendency and serve society as an effective remedy against sexual delicts.

§ 187. Penal Substitutes. Educational Order.

It has been proven that a purely academic education, while rendering certain services and preventing certain coarse frauds, by spreading a knowledge of the laws and developing foresight up to a certain point (which is a contrary force to occasional delinquency), is not altogether a direct and effective remedy against crime, and the schools, when they are badly supervised and especially when they are not secularized, are themselves the homes of certain crimes, such as criminal assaults. For the very small part which education plays as a determinant of individual conduct in comparison with the much greater influence exercised by conditions determined by the physical and social environment, it is necessary to add the moral training which results not from

[1] In my Italian editions (since in Italy, in this year of grace 1904, we have as yet no divorce), I considered it necessary to give some proof of this truth, which is axiomatic elsewhere, from comparative statistics. See the 4th Ital. Ed., pp. 438–444.

[*Cf.*, also *Lisle*, "The Bases of Divorce," "American Journal of Criminal Law and Criminology," May, 1913, TRANS.]

a sterile provision of empty and baseless maxims, but from lessons of experience and example. These lessons are received by every social class from its leaders, from the highest chiefs down to the humblest instructors. They are supplied by every institution, the government, the press, the professor's chair, and the preacher's pulpit, the theater, the public holidays. Thus, the suppression of certain cruel spectacles which make souls savage, the suppression of gambling houses, and so on, are practical measures of social education. The experimental direction of pedagogy, conformably to the general laws of physio-psychology and to the systematic physio-psychological study of the pupils by schoolmasters from the earliest years, by better adapting education to different human types, by making it less archeological and by putting it more in harmony with the necessities of life, would make men more capable of sustaining the fight for existence and by reducing the mass of declassed persons, would dry up one fountain of the excessive number of criminals. It is also urgent to improve the miserable condition of the teachers, who, obliged to fight against "malesuadam famem," cannot profitably devote themselves to popular education, of which they are the indispensable pioneers. The abolition of a great many holidays contributes to popular education; since holidays are always the occasion of numerous crimes and misdemeanors by bringing the people together for enjoyment. As Lombroso suggested, hygienic and gymnastic amusements could be substituted which would help to develop physical vigor at the same time with strength of character and resistance to adversity. Public baths also could be used, since attacks against the person more often occur in the warmest climates and seasons. And finally, free or almost free theaters, which would draw the people. A mass of crimes would be killed in the germ if their causes were removed, by preventing physical degeneracy through physical care of children, and by giving school children nourishment and preventing perversion through the education of neglected children with the aid of public schools, protective institutions, farming settlements, instruction given to the families of farmers, and the like, following the example set especially by England and America; instead of waiting until the evil has taken on gigantic proportions and having recourse to a useless repression.[1]

[1] The protection of neglected children is a fundamental means for the replacement of penalties since it exerts the most far-reaching influence on thousands of

§ 188. Penal Substitutes. Neglected Children.

Neglected childhood is the source and the seed of habitual criminality and recidivity. In its epidemic form, it, too, is a product of contemporary industrialism, which, with labor day and night of men and women, has destroyed all family life, forcing the children of the proletariat to grow up in the mud of the streets, and hence, to become accustomed to begging, petty thievery, and offenses of immorality, even when they are not compelled to it by their parents, from whom poverty has taken every human attribute. The absurdity of punishment inflicted on abandoned children is flagrantly obvious. On the one hand, as an "a priori" principle, the moral, and hence legal, irresponsibility of the child is conceded by grading the degree of free will and responsibility from period to period until majority. There is always the prejudice of the "ladder of crime" according to which the minor before becoming a great criminal ought to begin with small misdemeanors, following a sort of bureaucratic career in crime. The truth, on the contrary, is, that neglected children who begin with small misdemeanors seldom advance to the greater crimes. They remain the microbes of the criminal world, chronic but harmless in their criminal relapses. The great criminals commence their terrible exploits in their youth and sometimes in their infancy, because, as we have seen, precocity is one of the traits of the criminal by birth.

On the other hand, when a half or a third of responsibility is attributed to the minor he is sent to prison, a school where he will perfect himself in the art of crime if brought in contact with criminals worse than himself and where his physical and moral degeneracy will increase if he remains isolated or with other minors. Here again it is evident that for this seminary of crime in place of repression should be substituted preventive means which should be suited to the different categories of this precocious army of crime. Distinction should be made between

individuals who are specially predisposed or exposed to crime. It is equivalent, as a sanitary preventive, to the boiling of water in times of cholera or typhoid epidemic and in the same way sterilizes the pathogenic germs. England owes the decrease of crime largely to the vigilant and extensive care given to neglected minors.

In France there is the law of 24 July, 1889, for the protection of ill-treated and morally abandoned children (R.C., 1889, pp. 618 *et. seq.*) — and changes in it are contemplated. There is also the law of 19 April, 1898, for the repression of violence and ill-treatment toward children.

abandoned infants, foundlings, and orphans, the greater number of whom die in tender years while the others almost always become outcasts and criminals. There is, further, morally abandoned infancy, which is often also ill-treated and tortured infancy. This last is moreover almost always the victim of the hysteria and hystero-epilepsy of the mother when not the victim of a cannibal-like greediness. In England, for example, there were nineteen thousand little children intentionally allowed by their parents to die that the latter might get the insurance money — this during a period of five years. The children of convicts, drunkards, vagabonds, and beggars constitute the substructure of morally abandoned infancy which carries the hereditary virus of degeneracy in its veins. In addition to these there are the hordes of children abandoned through necessity by their parents who are condemned to a daily isolation in mines or shops. Less numerous, but more dangerous, are the last two categories; vicious infancy and delinquent infancy.[1] As for alcoholism, so all sorts of remedies have been tried for the different categories of neglected children, categories which are almost always intermingled. For children materially abandoned, a solution of the problem of girl-mothers has been attempted through relief at home, through laws permitting the proof of paternity and fixing the responsibility for seduction. In fact, laws have even been suggested giving legal recognition to concubinage such as existed in Roman law. For the other categories there is hesitation between two systems: assembling the minors in a species of barracks (schools of correction, industrial schools, poorhouses, and public schools), and placing them in families, which is more difficult in practice, but much more hygienic. England is the classical country for the protection of abandoned infancy; this protection has been accomplished more through private initiative than through official action and on a large scale, which explains the decrease, or at least the arrested increase, of natural and hereditary delinquency in that country. The schools for the poor, industrial schools, reform schools, have an average of about 48,000 children a year (of whom 23,000 are in the " ragged " schools). At the same time the charitable institutions organized to prevent crime are occupied with one hundred and ninety thousand children almost every year.

[1] *Ferriani*, "Minorenni delinquenti"; *Morrison*, "Juvenile Offenders" (London, 1896).

Besides this, as a matter of private initiative, Dr. Bernardo, among others, began in 1866 to concern himself with the little vagabonds of the London streets. After nourishing them and giving them some education, he sent them to the colonies, principally to Canada, where they became workmen. Perhaps the economic point of view is no stranger to this enterprise of Dr. Bernardo, but his work is not less admirable on that account since he cared for a yearly average of eight thousand minors and has already placed more than one hundred thousand, eighty-five per cent. of whom, according to his observations, were the sons of drunkards. In America, the Elmira Reformatory (founded and directed by Dr. Brockway for the application to the improvement of criminal and vicious minors of the principles of criminal anthropology in aid of a physiological, phychic, and disciplinary cure, in accord with the data of physio-psychology and criminal pathology) is another notable effort directed by the principle of segregation during an indeterminate time, — a principle afterwards adopted by the legislature of many States of the great American Union. In Teutonic countries, abandoned children are placed in honest peasant families. If the exploitation of the children is avoided, this system of family colonies certainly has advantages, especially when compared with the quartering of minors for a fixed period in the so-called houses of correction. In a few States of the American Union, and in Denmark, there is a combination of the systems of large establishments with that of placing minor in families. Nevertheless, for neglected childhood, as for alcoholism,[1] the radical remedy will be found only in a social reorganization, where the life of the family, on the one hand, will be made possible and agreeable by a higher standard in the life of the people, and in which, on the other hand, the school will effect a real social function, nourishing body and mind, and will no longer be a sterile, bureaucratic source of an entirely superficial and literal instruction. Furthermore, some of these sources of crime would be absorbed and the fatal school of crime would be fought by prohibiting immoral publications, now permitted through a false and trifling conception of liberty, which is satisfied with the imprisonment of the responsible agents when the evil is already done. The courts, also, should cease to furnish demoralizing spectacles open both to the better classes, who frequent them, as the decadent Romans attended the cir-

[1] See *ante*. And for vagabondage also G, § 182, *ante*.

cus, and to minors and defectives, who come there to learn how to commit crime with greater security. Hence the ministerial circulars such as those of the honorable Varé, for example, which seek to combat these dangerous customs, are praiseworthy, at least for their good intentions, although they have met with no success. According to Fleury.[1] by suppressing reserved seats in the Belgian courts, a very notable decrease in the number of spectators of the higher class was brought about in the same way that in England the technical character of the legal arguments, from which everything of a theatrical character is excluded, has singularly diminished the number of idle rich and poor who in other countries flock there.[2] Especially favorable to popular education and adverse to crime, would be the suppression of the false glamour of crime and vice, which even rulers sometimes father, when crime and vice serve the interests of the dominant class, or are committed by individuals in whom that class finds unscrupulous defenders.

[1] *Fleury*, J. E. (November, 1874).

[2] *Cruppi*, "La cour d'assises" (Paris, 1898).

The relations between crime and publicity (in the trials and in the press) has been discussed with animation in the International Congresses called for the purpose at Lausanne, Geneva, and Paris. Yet there is exaggeration (and this is the case with d'Aubry) of the determining and contagious efficacy of newspapers and books, since their influence is exercised only on individuals predisposed to it and who for this reason would have been impelled to crime by any other stimulant. In substance, the influence of publicity seems to be exercised rather on the manner of committing crime and by way of imitation, than on the decision to commit it, since to be a criminal it is not sufficient to desire it. Again, the liberty of the press (except when it amounts to a formal assault upon morals) is too essential to civil life for its abolition or restriction, with a view to avoiding some inconveniences which are always inevitable. Thus, as I shall say presently, we must examine which is the lesser of two evils; to suppress an institution or to suffer in preserving it some inconveniences that are compensated by greater advantages. Yet it is certain that if the enormous advertisement given criminals and crimes by the papers is controlled by the force of public opinion (rather than by police restrictions, it will be a great advantage, all the greater because it will be the natural fruit of a more satisfactory civilization. For the influences of the press exercised only on persons predisposed by degeneracy or a psycho-pathological condition, see *Ferri*, "L' Omicidio," pp. 562, 563 and 414.

CHAPTER VI

PREVENTION AND REPRESSION

Fundamental identity of prevention and repression. The fight against crime and its radical transformation.

§ 189. Social Prevention More Effective Than Penal Laws.

The examples just given and which could be made into a preventive code opposing the penal code article by article show clearly the enormous importance of the social factors of crime, which depend upon the manner in which all of the parts of the social organism interact. They show, even better than the legislator, how a change in these factors effectively corrects the advance of criminality, within the limits marked by the concurrence of other criminal factors, and, hence, marked by the law of criminal saturation. Quételet was right when he said in this connection: "As the crimes annually committed seem to be an unavoidable result of our social organization and as the number cannot be decreased until the causes from which they spring are modified, it follows that it is the function of law-makers to recognize and destroy these causes as much as possible. It is their function to make up the budgets of crime as they make up the receipts and expenses of the treasury." [1] This may be, and in fact, is true, but it must not be forgotten that all of this should be done outside of the penal code. Strange as this may seem at first glance, it is the truth, as proven by history, statistics, and the direct observation of phenomena, that the penal laws are the least efficient in the prevention of crime, since the principal rôle falls to laws of an economic, political, and administrative order. Indeed, as Ellero says, "The rôle of penalties is purely negative and comes only in the last rank." [2] They do not remember the occasions of crime which operate in the individual and in the environment. At the most they retard for a time (if they do even that) the torrent of weaker impulsions which are, however, always ready to overflow. Moreover, in the penal code

[1] *Quételet*, "Physique sociale," Lib. IV, § 8.
[2] *Ellero*, "Opuscoli criminali," p. 53.

itself, because of this indirect dynamic effort of psychic forces, of which I have already spoken, the law-maker should change his present course and give greater influence to pecuniary fines, capable of adjustment to the offense and the offender.

Compared with imprisonment, they have the advantage of being less violent and direct, and, hence, their effect is more certain because, as Machiavelli said, men give up their life more willingly than their money. It should also be considered that pecuniary penalties are capable of an easy and economic application; that they can be greatly raised and thus reimburse the State and the victims of the crimes; finally, that they are a real antidote against the madness of sudden wealth. Yet the legislator, consulting the data of criminal statistics, should oppose these penalties to the misdeeds that are preferably committed by the well-to-do and hence, solvent classes, without renouncing detention which is appropriate in the most serious cases: such as hired assassinations, and, in general, the serious attempts against the person and against morals — bankruptcy, forgery of commercial and official documents, extortions and bribery, peculation, abuse of authority, theft of public documents, and duels. Power should be given to the judge to remit fines in cases of poverty; for the substitution of imprisonment for fines is an iniquitous survival of the barbarous laws which in primitive times permitted the creditors to divide the body of the debtor among themselves, and later established the debtor's prison, which civilization has condemned and abandoned.[1] In a word, the legislator, conforming to the lessons of scientific experience, should realize that social reforms have much more power to prevent the overflow of crime than penal codes. His task is to maintain the health of the social body. He should, therefore, imitate the physician who preserves the health of individuals; and as little as possible and only in extreme cases, within the limits of strict necessity, have recourse to the violent methods of surgery. He should have but very limited confidence in the problematical value of remedies and should rely upon the safe and continuous services of hygiene. In social defense against crime and in the moral uplift of the people, the slightest progress

[1] The new Italian Penal Code inflicts pecuniary penalties more often, especially for contraventions. But as it keeps in mind specially the crimes usually inspired by cupidity rather than those which are more frequently committed by the well-to-do, it has in this particular, also, stopped short of the proprieties and necessities of social life.

in the reforms of social prevention is worth, a hundred times and more, the publication of a whole penal code. Indeed, legislators now use what might be called the method of blood-letting. Like physicians of other days, who, little versed in experimental diagnosis and prophylaxis of individual diseases, treated them all more or less by blood-letting in order to drive out of the body the "evil humors," so our legislators of today, with all the phenomena of social pathology before them, have recourse to blood-letting, imprisonment applied in stronger or weaker doses. First of all, they fail to learn that in reality this so-called remedy never cures either society or individuals. Then, too, they do not see that, the greater part of the time, they neutralize whatever action a law could have, by always innoculating the social body with new "evil humors," by the incoherent mass of other laws. When a new law is proposed, for example, on the customs duties, divorce, railways, the treatment of employees, taxation, industrial freedom of association, or any civil and commercial reform, very few people — nobody, so to speak — think of the disturbance that these innovations may cause in the criminality of the people, because they believe that the measures on which criminality depends have been taken, and that changes in the penal code are the only necessary remedies. We should not foolishly boast of the suppression of evil. Let us not forget that if law is inseparable from society, a law necessarily involves crimes in its violation.[1] Existence imposed a struggle, and, as I have said elsewhere, this struggle is kept up either by honest or economic activity or by dishonest and criminal activity.

§ 190. Inevitability of Social Friction. Crime Unavoidable.

Again, in the social organism, as in every other organism, there are inevitable frictions. It is absurd to confuse order with the apathy or stagnant inertia of an enervated and servile people and to make a trembling appeal to the police and the courts whenever a leaf rustles. Social order cannot eliminate shock and friction in all the parts of the collective organism. All that can be done is to reduce to a minimum the more or less criminal shocks and frictions. And we already know that penalties are far from being the most effective and most appropriate instruments in

[1] It is in this sense that *Bentham* said: "To create rights and obligations is equivalent to creating crimes," " Vue générale d'un corps complet de législation," Chap. III.

attaining this result. These general remarks which I have just presented on the theory of equivalents for penalties in relation to the law of criminal saturation (which were already found in the preceding editions) are enough to meet the two principal objections which have been addressed to me by a few of those who at bottom have really accepted my theory.

§ 191. Penal Substitutes. A General Argument.

They say, on the one hand, that some of the equivalents for penalties proposed by me have already been applied and have not prevented criminality. On the other hand, they say that it would be absurd to abolish certain institutions solely because the transgression would also be abolished. I answer, first of all, that the equivalents for penalties are not intended to render every misdeed impossible, whatever its nature, which would be absurd, but rather to diminish the causes of misdeeds and hence to suppress the misdeeds themselves more or less completely. There are still acts of piracy committed; but it is none the less true that steam navigation (taking the place of penalties in this particular) has been a hundred times more efficacious than all the laws. There are still murders committed in the trains, but the substitution of tramways and railroads for the stage coaches of other days has none the less been a powerful equivalent for penalties and has enormously reduced the number of armed robberies, with or without homicide. In like manner divorce does not absolutely prevent one spouse from killing the other, but it makes this crime rarer. Finally, the measures taken on behalf of neglected children certainly do not cause the prisons to be closed for lack of convicts; but they do exhaust in a great degree these fountains of crime that our codes permit to spread. And the same is true of other penal substitutes. I have already said (apropos of the institutions and prohibitions in force) that whether their suppression would cause a greater evil than that which comes from their transgression should surely be examined. Later I revolted especially against the widespread illusion by which people are persuaded that to remedy a social disorder nothing can be done except to multiply prohibitions and punishments, being blind to the effects which always reappear, instead of seeking and suppressing the causes when possible, or at least in weakening them by indirect measures and making them as little offensive as possible. I made a criticism of the equivalents for penalties that

had not been made by others, to the effect that its application is very difficult. It is enough to think even of the prodigious quantity of habits, traditions, and contrary interests, which must be overcome in order to apply it all at once. The equivalents for penalties indicated for the different orders of social activity show this: A great number of them, such as measures against alcoholism, in favor of neglected infancy, or for making the administration of justice quicker and easier, imply not a single reform but entire systems of numerous and coördinate reforms.

§ 192. The Importance of the Theory of Penal Substitutes.

But (and I do not tire of repeating it) the importance of equivalents for penalties is not in the practical value of this or that isolated proposition. The object, the soul of the theory is to eliminate or at least weaken the mental habit of thinking of penal laws as the only means of avoiding the phenomena of social pathology. Of course, even in private life, it is tiresome and difficult to follow continually the rules of hygiene. It is easier, although more dangerous, to forget them and wait until the malady appears and then have resource to the more or less illusory remedies of medicine. But this public and private improvidence itself is exactly what needs correction. As hygiene was impossible, both in theory and practice, before the observations and experiments of physio-pathology on the causes of disease, especially epidemic and infectious diseases, and before the discoveries of bacteriology; so, in like manner, social hygiene against crime was only possible as a theory and can only be possible in practice through the discoveries and dissemination of the data of criminal anthropology and criminal sociology and a knowledge of the natural factors of crime, especially of the factors of more or less epidemic occasional criminality. Let me further add that legislators and statesman must really take the present physical and psychic conditions of the people into account in order to govern and solve the greater or lesser difficulties under more or less favorable circumstances of time and place. Science, on the contrary, need only designate the object, however distant and difficult of attainment it may be. The first condition for enacting legislative and social reforms is that they shall first be impressed upon the public conscience. This can be effected only when science, in spite of the transitory difficulties of the movement, resolutely and without any of the hybrid, sterile, and impotent compromises

of an eclectic opportunism, points out the route to follow and the ideal to be realized.

§ 193. Prevention of Crime a Duty for the Criminologist.

To all that I have said so far, two principal objections can be made. The first is, that this outline of a system of equivalents for penalties is nothing more than the ordinary prevention of misdeeds. The second is, that it does not concern the criminalist, because prevention is less a science than an art, the art of good government, quite distinct from the true science of crimes and penalties. It will be more convenient to treat of the second assertion in the next chapter [1] and in the final conclusion; hence, I shall say a few words about the first. My reply is, that since Montesquieu and Beccaria, the utility of the prevention of misdeeds has been known. That utility is certain yet it is proclaimed only in platonic and isolated declarations and not followed up by a systematic development, which, with the support of criminal sociology, could lead to immediate applications in practice. We, however, beginning with the observation of facts, have arrived at a very different conclusion, more prolific of results: namely, that given the quasi-impotence of penalties against crimes, prevention, instead of being an accessory, should be the principal guarantee of social order. What is most important to remark is the difference between simple prevention of crimes, in the ordinary sense, and the equivalents for penalties, and between police prevention and social prevention. The first is limited to the prevention of the misdeed when its germ has already developed and its execution is threatened. It generally employs only means of direct constraint which, of a repressive nature themselves, have already been employed without success and often only provoke new crimes. On the contrary, social prevention goes back to the remote origin of crime in order to suppress the first germs. It seeks out the different anthropological, physical, and social factors of criminal phenomena and fights them entirely by indirect means, based on the free play of physiological and sociological la

§ 194. No Science of Criminal Prevention.

Science (and legislation as well) has until now given too exclusive a preference to repression, or at least to police pre-

[1] G. § 196 *et seq.*, *post.*

vention in the works on the science of good government, and especially in French works. In legislation, says Bentham, the part which has been given preference over all others is the penalty, because it is only too natural and convenient to say that in order to avoid certain acts they must be punished, and because prevention is the most difficult part, the part which requires the longest observations and the deepest reflection. Ellero adds that there are magistral works, folios, which treat not of punishment but of torture, and that none are to be found in which the author concerns himself in the search for a possible substitute for punishment. Montesquieu, Filangieri, Beccaria (in a few of his pages), and more recently Tissot,[1] speak of the influence exerted by the form of government, religion, climate, and soil on the penal system, but not of the manner of preventing crimes. The handful of writers who have treated this subject with larger and more systematic views (to mention only the most important, disregarding those who have more or less followed the spirit of the positive school in their writings on criminal sociology) are Bentham,[2] Romagnosi,[3] Barbacovi,[4] Carmignani,[5] Ellero,[6] and Lombroso.[7] Inspired by a more positive spirit and not doctrinaires with criminal theories, they study rather preventive reforms by the experimental method. But even these learned men are either limited to general and synthetic considerations, like Romagnosi and Carmignani; or else, descending into the domain of facts without, however, losing sight of the preventive defense of society, they have largely neglected the physio-psychological laws relative to the natural factors of crime, which alone could furnish efficacious means for the regulation of human activity. They have always definitely retained punishment itself as the principal means of prevention. Their teachings, having no more solid base than abstract reasonings, have on this account fallen into discredit since they had no foundation to bear the edifice. The authority of facts (an authority which always succeeds in imposing itself) was lacking in them. Without the aid of crimi-

[1] *Tissot*, "Le droit penal," 2d ed. (Paris, 1880), II, pp. 940 *et. seq.*

[2] *Bentham*, "Treatise on Legislation, Principles of a Penal Code."

[3] *Romagnosi*, "Genesi del diritto penale," P. V.

[4] *Barbacovi*, "De criminibus avertendis" (1815), and Discourse XIII on the "Scienza della legislazione" (Milan, 1824).

[5] *Carmignani*, "Teoria delle leggi di sicurezza sociale," Lib. III, Part 3.

[6] *Ellero*, "Della prevenzione dei crimini," in the "Opuscoli criminali."

[7] *Lombroso*, "L'incremento del delitto in Italia."

nal sociology they could not prove to a certainty that penalties have not the efficacy commonly attributed to them and that it is necessary to resort to surer means. "Now if these means have hitherto been neglected, it is because there is nothing more calculated to discredit and to make useless the means which are efficacious in regulating human conduct, than the employment of those means which are not." [1]

§ 195. Crime is Pathological. Need of Prevention.

We have just indicated the principal theoretical and practical relations of criminal statistics with criminal sociology, and they may be summed up in the following conclusion. In the same way that misdeeds are natural phenomena resulting from different factors, so also there is a law of criminal saturation, in virtue of which the physical and social environment, combined with hereditary and acquired tendencies and occasional impulsions, determines in a necessary way the quota of misdeeds. The things which influence the criminality of a people in the natural order are their individual and telluric conditions. In the social order, more than the penal code and with much greater intensity, they are the economic, political, administrative, and civil conditions and laws. The problem of the fight against crime presents two different aspects, both far removed from the simple barbarism of penal repression. For crime, in its atavistic and anti-human forms (forms contrary to the imminent and fundamental conditions of human existence), and in its evolutionary or politically anti-social manifestations (manifestations contrary to the transitory order of a given society), is not the fiat of free will and human perversity, but is rather an effect and symptom of individual pathology in its atavistic, and social pathology in its evolutionary forms. The function by which society is preserved from crime should undergo a complete change of orientation. It should cease to be a belated and violent resistance to effects and should diagnose and eliminate the natural causes. This function must be advanced as a preventive defense of society against natural and statutory crime. Now these equivalents for penalties represent not so much partial and passing reforms as mental discipline to

[1] *Stuart Mill*, "On Liberty."

Sometimes even legislators have established equivalents for penalty but with a rebound. This is what was done in Italy (and I proved it in my Italian editions) in the Codes of penal procedure and penal law and in other statutes. See 4th ed., pp. 462 *et seq.*

be followed in the solution of the problem, of which the final conclusion of this work will afford another aspect in the symbiosis or utilization of the tendencies of delinquents, according to the idea advanced by Lombroso. Since, however, the absolute disappearance of every crime-breeding condition is humanly impossible (even in a social organization capable of eliminating the epidemic and most common forms of crime) there will always be a need of a system of defense against the sporadic and acute effects of criminal frenzy. This agrees at every point with the universal law of evolution, according to which, in the continual variation of animal and social organisms, the earlier forms are never completely eliminated but persist as the basis of ulterior forms.[1] Consequently, the evolution of the social function of defense against misdeeds will be produced in the direction of a transition from the forms of physical and direct coercion to forms of a psychical and intellectual re-training of human activity, obtained by a change in the conditions of life of both the individual and society. But this is not saying that the primitive forms are to disappear completely.

A critical examination of the difficulties encountered by the criminalist of our day, far from leading to the negation of penal function and penal science, confirms their rational and political necessity, although it limits considerably their social importance and profoundly changes their spirit and object, in accordance with the data of anthropology and criminal statistics. This data, as we shall see in the following chapters, frees from all penalties every form of human activity, which does not constitute or is not accompanied by a manifestation of atavistic criminality. Against this criminality, the purely and stupidly repressive function will be transformed into a clinic, by which society will be preserved from the disease of crime as from any other physical or mental disease. In the meantime, to conclude this examination of the data of criminal statistics, which have thrown light on the social factors in the genesis of crime, I shall sum up my thought in the modification of an old comparison which has been singularly abused. Misdeeds in their entirety are compared to an impetuous torrent which should be met by the dykes of punishment to prevent society from being inundated and submerged. I do not deny that penalties are the dykes of crime; but

[1] *Ardigò*, "Le formazione naturale," in the "Opere filosofiche" (Padua, 1884), Vol. II.

I assert that these dykes are too weak to be useful. In the same way that sad and incessant experience teaches that material dykes are an insufficient protection from overflows of rivers (particularly at the moment when the latter are most formidable), so also statistics prove that penalties offer but insignificant resistance to the assaults of criminality, once the social environment has developed its fatal germs. Penalties, like the dykes at low water, are but useless scarecrows against those who are neither disposed nor forced to do evil. But as (according to the natural laws of hydrodynamics) the surest means of contending with floods is the reforesting of the mountains near the headwaters and straightening and deepening the rivers and improving their mouths; so, also, in protecting society from crime, it will be wiser to use the equivalents for penalties, also based upon the natural laws of psychology and sociology, and which are, therefore, not only more humane but much more effective than all the obsolete weapons of the arsenals of the ancient penality.

PART III

POSITIVE THEORY OF PENAL RESPONSIBILITY

CHAPTER I

THE NEGATION OF THE FREE WILL

Postulate of the Classical School denied by positivist physio-psychology; and in any event disputable in theory and dangerous in practice. The negation of free will. Eclectic compromise on moral liberty.

§ 196. Problem of Penal Responsibility.

The most radical and hence the most contested conclusion (even by those who are strangers to penal studies) brought home by the new data of anthropology and statistics on crime and those who commit it, has been, and is, the new way of stating and solving the fundamental problem of responsibility. The technical results of biology and criminal sociology, the proposals of practical reforms in systems of procedure and repression, may be and are admitted, wholly or in part, even by those who do not follow the method and inductions of the positive school. Still, the revolt of the enemies of every novelty against the positive school appears and persists both in the irreconcilable attitude of classical purism in opposition to reform and in the thousand accommodations of academic eclecticism, especially when there is question of the criteria and bases of penal responsibility.[1] This is because the problem necessarily goes outside of the technical limits of criminology to test and shatter the mass of mental and sentimental habits which constitute the social dogma of human responsibility, even outside of the penal domain, and to modify the ideas and norms of merit and demerit, of reward and punishment, of vice and virtue, in every manifestation of civil life, in the moral as well as in the economic field, in the family as in the school and in social life.

[1] A recent notable example of this is found in *Saleilles* "Individualization of Punishment" (Modern Criminal Science Series, Volume IV), where the author accepts the practical propositions of the positive criminal school, but has not courage enough to abandon the metaphysical principles on human responsibility.

And this confirms the fact mentioned in the introduction, namely, that this new position of the science of crime and punishment depends intimately on the general renovation observed since 1850 in philosophical thought as the result of the experimental method.

§ 197. Basis of the Right of Punishment.

The habitual reasoning by which public sentiment, traditional philosophy, and classical criminal science justify the right to punish man for his misdeeds is reducible to this: man possesses free choice or moral liberty; he can will either good or evil, — and hence, if he chooses evil he is responsible for his choice and should be punished for it; and accordingly, as he is or is not free, or rather as he is more or less free in the choice he makes of evil, he is more or less responsible and punishable. The positivist criminal school does not accept this unanimous reasoning of the jurists, for two main reasons. The first is, that positivistic physio-psychology has completely destroyed the belief in free choice or moral liberty, in which, it demonstrates, we should recognize a pure illusion of subjective psychological observation. The second is, that even accepting this criterion of individual responsibility, insurmountable theoretical and practical difficulties are met in applying it to each particular case, and the field is left open to a mass of exceptions, as the result of false deductions drawn from the new and incontrovertible data furnished by the study of criminal man.

§ 198. Moral Liberty.

To affirm free choice or normal liberty (and our opponents, to promote confusion with this elastic and indefinite word "liberty," never say free choice, although the two terms are perfectly synonymous) is to assert, that, in the face of the ceaseless and multiform pressure of the exterior environment and of the conflict of divers interior motives, the will of the individual has the final decision between two opposite possibilities. Now, it is not disputed that consciousness finds this the easiest and most spontaneous answer, although there is every day an increase in the number of those who are, on the contrary, conscious of the nonexistence of the free will.[1] But for those who believe in it, there is nothing to prove that this moral conviction corresponds to the

[1] Such were the declarations of Moleschott as enthusiastically received at the First International Congress of Criminal Anthropology, A. C. A. C. (Rome, 1886), p. 320.

positive reality or is an adequate representation of it. It is shown, on the contrary, in the first place, that this feeling of freedom to will one thing rather than another is a pure illusion arising from the fact that we have no consciousness of the immediate antecedents, whether physiological or psychic, of the deliberation which precedes the will. To the negative demonstration, disclosing the origin of this natural and, hence, universal and obstinate illusion, scientific physio-psychology, uniting external observation through proofs and counter-proofs with the mere internal or suggestive observation, adds a positive demonstration by showing the natural process in accordance with which every voluntary act of man is unrolled. Let us consider (as we must) the voluntary activity of man as the highest and most complex form of animal activity. We will fully recognize that from the most humble extremity, namely, from a mere reaction of irritability in the most elementary animal forms, the protozoa, for example, up to the highest extremity, namely, the deliberate act of a human being, there is a continuous series of shades and degrees which do not admit of a special privilege in humanity by the intervention of moral liberty, which would be a miraculous exception in the entire order of universal activity.[1] Thus, from the weakest and least perceptible glimmer of intelligence in the simplest animal, we reach, by a continuous series of shades and degrees, the highest manifestations of human genius.

§ 199. Process of Action.

The physio-pathological process of every individual action is reducible to the following scheme: (*a*) a physical phase external to the nervous center, which may have its point of departure outside of the individual in the external world or in his body; for example, a vibration of the air or ether which chances to strike the periphery of the body, or perhaps a movement produced in the body itself, whether in the stomach, liver, or elsewhere; (*b*) a double physiological phase, first a centripetal vibration in the

[1] *Verworn*, "Psycho-physiologischen Protisten-Studien" (Jena, 1889); Binet, "La vie psychique des micro-organismes," in "Le fétichisme dans l'amour" (Paris, 1891); *Schneider*, "Der thierische Wille" (Leipsic, 1880); "Der menschliche Wille" (Berlin, 1882); *Sirkowski*, "Développement de la volonté chez l'enfant," R. P. (May, 1885); *Marion*, "Les mouvements de l'enfant; premier progrès de la volonté," in the "Revue Scientifique" (June, 1890); *Baldwin*, "Le développement mental chez l'enfant et dans la race," pp. 339 *et seq.* And to the same effect, the works on infant psychology by Perez, Preyer, etc.

substance of the nerve whose peripheral extremity is struck by the physical movement and which transmits to the nerve center the vibration determined by this movement; and secondly, a centrifugal movement which follows the same nerve in a contrary direction and transmits this same vibration from the center to the periphery; (*c*) a new physical phase, which is the muscular movement, mechanical, the external action, the effect of this centrifugal nervous current. For example, a man speaks to me: there results an exterior movement of the air, a centripetal nervous current from the ear to the brain, a centrifugal nervous current from the brain to the arm and a movement of the arm itself.[1] This fundamental evolutive process may have two modalities: either at the instant the centripetal nervous current reaches the brain, we are aware of it and it then becomes conscious, and passes, as Sergi says, into the psychic phase[2] and is seen in

[1] In connection with this psycho-physiological process, there is the well-known theory of "idea-forces" developed by *Fouillée* in his "L'évolutionnisme des idées forces" (Paris, 1890). But either you understand by this what *Ardigo*, in 1870, in his "Psicologia come scienza positiva" called "the psycho-physiological impulsive force of ideas," when it is reduced to a transformation of force, by which the physical movement, determining the sensation, is converted into a muscular movement determined by the nervous system, or else you add a metaphysical principle to this positive and undeniable datum, as is the theory of Fouillée, and then the theory turns into a work of the imagination and is only one of the ordinary eclectic movements between past spiritualism and present positive psychology. See *Tarozzi*, "L'evoluzionismo monistico e le ideeforze secondo Fouillée," in the "Rivista philosofica scientifica" (December, 1890). For, treating of the problem of free will and opening the discussion between the partisans of liberty and the determinists, Fouillée, in "La liberté et le déterminisme," 2d edition (Paris, 1884), Lib. III, like *Siciliani* in "Le questioni contemporanee e la libertà morale nell' ordine giuridico" (Bologne, 1889), a republication of "Socialismo e Darwinismo" (Bologne, 1879), and like all eclectics generally, concluded that beyond a doubt freedom does not exist as an arbitrary power of will, but that it does exist as "idea-force" tending to its own realization and, consequently, "man is not free but becomes free." This is a play upon words. Magical thoughts, with which those (and there are many of them) can content themselves who recoil into philosophies before the precise and radical solutions, which have no solid or fecund content. It is incontestable that the idea of moral or volitive liberty, like all other ideas, such as that of their own intelligence, energy, or fortune, exercises a very efficacious influence on the conduct of men, being one of the motives which by auto-suggestion, determines their course. And, on the other hand, the idea of non-volitive liberty or psycho-physiological determinism exerts an influence which, no matter what is said, is neither harmful nor enervating. But this thought born of psychological illusion, explained hereafter, has really nothing in common with the independence of the human will as far as its determining causes are concerned. And as in them alone free will and moral liberty are found, this idea is inadmissible.

[2] *Sergi*, "Sulla natura dei fenomeni psichici," in "Archivio italiano di antropologia" (Florence), X, I; *Masilles*, "Les phénomènes moteurs et la volonté" R. S. 29 (March, 1890).

sensation, in the feelings, in ideas, in voluntary effort; or else it does not reach this psychic manifestation, but it remains in the domain of unconsciousness as a simple reflex act. In the latter case, which is the more simple, the evolutive process is, as I have said, composed of three phases, of which one is double. On the contrary, in the case of conscious manifestation, there is a further physical phase which divides the double physiological base and there are then produced these five stages of complex phenomena: external physical movement at the beginning — centripetal physiological current, psychic manifestation, centrifugal physiological current, finally, external physical movement. If this process does not reach the psychic phase it remains in the condition of a simple reflex act, unconscious and involuntary, where the idea of the free will does not enter. If, on the contrary, it attains to psychic manifestation and becomes a conscious and voluntary act, there is then produced, through the illusion indicated below, the feeling of volitional liberty during the psychic phase, particularly in special cases where the deliberation is not instantaneous, hence, more distinctly noticed.

§ 200. Moral Liberty an Impossibility.

The supposition of liberty violates two universal laws which make it absolutely inacceptable. There can be observed in this evolutive cycle of an initial physical movement transforming into a physiological movement and then into a final physical movement a further instance of the universal law of the transformation of forces, which, thanks principally to Mayer and to Helmholtz, is certainly the greatest discovery of the age in natural philosophy.[1] Now, since this law, the correlative of Lavoisier's law on the conservation of energy, cannot be conceded unless we admit that, in the whole series of phenomena nothing is created, nothing is lost and that there is always the same quantity of force, which takes different aspects, it follows that the hypothesis of free will is inadmissible, that is, of a volitional faculty which, intermediate between these transformations, would be able to suppress or add something, either by preventing the ulterior manifestations of individual activity, or by altering the energy or direction of this activity, effecting a real creation or destruction of forces.[2] Another universal law which is the

[1] *Spencer*, "First Principles"; *Balfour Stewart*, "Conservation of Energy."

[2] Attempts have been made by Saint-Venant, Boussinesq, Delboef, and more

very base of our thought, and which has been scientifically proven, is completely opposed to the hypothesis of a will free to choose between two contrary solutions, namely, the law of natural causality. In virtue of this law, every effect being the necessary proportional and inevitable consequence of the entirety of causes which produce it, of its mediate and immediate precedents, a faculty is inconceivable which could realize an effect different from that which results naturally from its proper causes. These general demonstrations of the impossibility and inconceivability of free will or moral and volitive liberty are aided by the most positive confirmations of fact based on experience. Physiology and psycho-pathology[1] concur in demonstrating that the human will is completely subject to natural influences, not only of the moral or psychological order but also of the purely physical order and is far removed from dominating them in a more or less absolute way. Statistics in turn show that individual wills taken collectively obey the exterior influences of the physical and social environment.[2] Every man has his own physical and psychic personality (temperament and character) which is essentially determined by physio-psychic heredity, and is developed and modified according to environment. But especially in relation to his affective life, this personality persists as a more or less conscious but constant and inflexible determinant of individual conduct; that is to say, that man acts as he feels and not as he thinks. In the same way there are, by reason of special and original constitution of the nerve centers, some men of great intelligence and others of feeble intellectual power. In like manner, there are men endowed with great will power and great energy of active resistance, and others whose will and activity are feeble, intermittent, or unstable. Furthermore, the same

recently by *Couilhac*, "La liberté et la conservation de l'énergie" (Paris, 1898), and by others to reconcile free will with the conservation of energy, but *Fonregrive* himself, in "Libre arbitre" (Paris, 1887), p. 298, as well as Groder and Fouillée, recognize that it is impossible, provided that one is not ready to accept its logical consequence, "the contingency of the laws of nature." This was, however, accepted by *Boutroux* in "De la contingence des lois de la nature" (Paris, 1874). See also *Fouillée*, "La réaction contre la science; la philosophie de la contingence," R. P. (January, 1894); *Douriac*, "Pour la philosophie de la contingence" (a reply to the above), in the "Année philosophique pour 1895" (Paris, 1896), p. 77; *Pillon*, "Les lois de la nature," R. P. (January, 1897).

[1] *Maudsley*, "The Physiology of the Mind"; *Herzen*, "La physiologie de la volonté" (Paris, 1874); *Ribot*, "Les maladies de la volonté" (Paris, 1888).

[2] *Buckle*, "History of Civilization in England"; *Wagner*, "Die Gesetzmässigkeit in den scheinbar wilkürlichen menschlichen Handlungen."

individual not only notes the powers of his will developing at the same time with those of his body in the same way that this occurs for every other organic function; but at different moments, on account of external or internal influences, he has invincible weaknesses of will or recrudescences of energy and volitional celerity. A high temperature, a hot wind, nervous exhaustion following excessive labor, a period of slow digestion, and many other accidental causes have a power, which every one has experienced, over the energy of our will, and even over our feelings. Every one knows how health, or better still an excellent digestion makes a man benevolent and generous. Poverty or chronic hunger is really a great cause of physical and moral degeneracy. The will of a man for good or evil may be modified by a special diet. Coffee and tea excite the production of ideas; alcohol in small quantities excites the will, yet if taken to excess it leads to an organic degeneration which follows the weakening of the psychic functions of intelligence and will. The same may be said of the characteristic action of certain poisons, narcotics, and the like. Finally, let us add the recent eloquent data of hypnotism permitting the experimental production of a species of psychological vivisection to such an extent that it is not possible longer to deny that the human will depends absolutely and continually on the organic and, hence, psychic conditions of the individual.[1] If this dependence of will in relation to special congenital or acquired, permanent or transitory, states of the organism, be conceded (since it cannot be denied in the clear cases) by what right can we deny it under all other circumstances where it appears less clearly? Does it follow that a thing has less existence because it is less evident? There are many other instances besides these in the physiological domain. After he had made a study of the diseases of memory and personality, Ribot collected and arranged many observations of fact to establish diseases of the will. He studied its impairment as the consequence of a lack or excess of impulsiveness, its anomalies and even its destruction depending, like every other mental disease, on the pathological conditions of the organism.

[1] *Morselli*, in "Il magnetismo animale e gli statiipnotici" (Turin, 1886), p. 189, said, "Hypnotism has finished by destroying every prejudice against free will."

§ 201. Indivisibility of the Human Mind.

The traditional philosophy, with no other means than erroneous introspective observation, has spread the idea that the human mind is divisible into several faculties, — memory, intelligence, and will, — each of which, as a real self-existent entity, has the task of producing at each instant through its essence each of our recollections, ideas, and volitional deliberations. Hence it is that we hear the "will" spoken of as intervening to decide between two series of contrary motives. If we look to positivistic psychology for a less fantastic and less naïve notion of the mental faculties, we find that these so-called faculties are but syntheses, works of the mind corresponding to no real entity. As the color red is the subjective synthesis of all the different red tints which we have seen reunited in what they have in common without there being objectively a self-existent color red (since there exists only such or such an object of such or such a determined shade of red), so memory and intelligence are but the subjective abstract and general sum of all the particular thoughts which we have had either in our own existence or as an inheritance from our ancestors. Nor does a memory exist. There are only isolated acts of memory in the same way that an intelligence does not exist, there being only isolated thoughts, and so on. In like manner the will is but the abstract synthesis of all of the volitional acts which we have performed. Hence the will does not exist as an autonomous being which from time to time issues volitional commands.[1] Nor is this all. The volitional deliberation resulting from the above-mentioned physio-psychological process of every human act, is not the cause of the movement; it is but the consciousness of this very movement which is being executed, not by virtue of the volitional command, but merely by the process of reciprocal transformation of physical and physio-psychological forces. This is equivalent to Ribot's statement: the "I will" takes note of a situation, but does not create it.[2] So true is this that the final muscular movement may be produced where an electric current, applied to the same efferent nerve, takes the place of the volitional command and centrifugal nervous current.

[1] For the theories of will in modern psychology, see *Kuelpe* in his "Philosophische Studien," V. 2, 1888–9, and *Villa*, "La psichologia contemporanea" (Turin, 1899), pp. 418 *et seq.*

[2] *Ribot*, "Les maladies de la volonté," p. 175.

§ 202. No Free Will Because Will is not an Entity.

If there is no self-existent will, but only isolated and successive volitions; and if every volition is simply the consciousness of the physio-psychological process about to be completed (and the difference between a voluntary and an involuntary act is merely the presence or absence of this consciousness), it is clear that we cannot conceive of moral liberty or free choice. Since free choice would be an inseparable quality of the human will, the moment the self-existent subject, or will, is suppressed, the quality attributed to it disappears. This positivistic and scientific manner of considering the human will serves also to refute the contradiction of the disguised neo-spiritualism of which I spoke,[1] and which Grote intruded into the Congress of physiological-psychology at Paris, but without finding any[2] sympathy. His partisans say that as a general thesis the function creates the organ and that in our special field "crime creates the criminal," while the inverse is not true. In truth, it is impossible to conceive of a will as an autonomous psychic force, foreign and anterior to any organic element. The will is conceived only as the resultant and function of an organ upon which it doubtless reacts, since every effect becomes in turn a cause, but the order of succession cannot be inverted. There is no organ without an actual function. That is an idea of which we are unable to conceive. It may also be said that we are not even able to conceive of a crime without a criminal to commit it, while it is possible, in the biologico-social, if not in the legal sense, that there should be a criminal (personal dispositions being restrained by favorable circumstances) who has never committed a crime. Certainly the crime committed exercises a reaction on the criminal by stifling or destroying that repugnance to wrongdoing, the absence of which creates an habitual criminal. We know that by reason of a property of the nervous system an act once executed is more easily repeated; but to say that an effect may become the cause of ulterior effects is quite another thing than that the effect precedes and determines the cause.

[1] *G. S., ante.*

[2] *Grote,* "La causalité et la conservation de l'énergie dans le domaine de l'activité physique," "Congrès international de psychologie physique" (Paris, 1890), p. 106.

§ 203. Statistics Prove That There is No Free Will.

Passing from isolated individuals to the mass of individuals, statistics with equally convincing proofs confirm the dependence of the voluntary activity of man upon the conditions of physical and social environment. First of all, racial differences (which are to a people what temperament is to an individual), controlling both intelligence and will, are an initial manifestation of this dependence. Consequently, the data supplied by demographic and criminal statistics, so neglected by the defenders of the free choice, have shown that those human acts which were believed to be the most free morally, such as marriages, suicides, crimes, or emigrations, were, on the contrary, subject to the influences of environment and varied with these influences. Statistics have thus given the death blow to the idea of a moral liberty.

§ 204. No Limited Freedom of Will.

It is needless for me to advert here to the compromise, which many statisticians have adopted, according to which the regularity and necessity of human acts shown by statistics are true for the mass but not for individuals who always preserve a relative and limited freedom "like a bird in a cage." At bottom this eclectic explanation always implies the strange consequence that it is possible for the sum of many individuals "relatively free" to compose a mass "absolutely determined" in its activity. In my opinion, the observation which I have made is constantly decisive, namely, that if statistics alone do not suffice to prove the non-existence of free choice, they incontestably serve to confirm it.[1] Furthermore, this moral liberty, if once admitted, would make all psychological and social science impossible and absurd in exactly the same way that the supposition of free choice in the atoms of matter would destroy all physical and chemical science. Hence, the negation of free choice instead of being, as the spiritual schools assert, the source of all evils, is fertile in beneficent effects in moral and social life, since it teaches tolerance of ideas, inspires mutual indulgence and counsels, and in pedagogy as well as in the art of government a moral hygiene which anticipates evil sentiments instead of rigorously repressing them after they have developed. This negation is the necessary condition of

[1] *Ferri*, "Teoria dell' imputabilità e negazione del libero arbitrio" (Florence, 1878), and in his "Saggi."

all sociological theory and practice. Law has no other possible foundation than the determination of the human will by social motives, the only motives of which such laws can make any disposition. Indeed, the artificial action of juridical laws can be efficacious only when not too radically opposed to the more powerful plastic and dynamic elements of the motives which act naturally on every man. Since "La teoria dell' imputabilità e la negazione del libero arbitrio" deals in detail with the problem of the free choice, it is unnecessary to dwell upon either at greater length.[1] It was a scientific duty and a necessity to start with this explicit negation of moral freedom and not to avoid its discussion; since at the bottom of every research in social science one is confronted by this problem. If passed over in silence it is a continual source of misconception and inadmissible objection, particularly in researches in criminal law so intimately connected with human psychology.

§ 205. Free Will is Denied by Science.

Leaving to time and the natural expansion of positivistic ideas the task of gradually restricting the common belief in free choice, we must now take up two facts of great importance in the direction which the criminal sciences will take. In the first place, admitting that the negation of free choice is open to discussion and that this question is not to be settled in a peremptory fashion, how can criminal science and legislation base the whole edifice of human responsibility upon a faculty, so stoutly denied even by orthodox thinkers and disproven every day by the most irrefutable observations of fact? There is no objection to a personal belief in the existence of free choice, or moral liberty by criminologist, legislator, or judge, but can criminal law have the force and dignity of a true science when given a foundation so actively attacked on all sides? The necessity of withdrawing this criminal law and the social function which it regulates from philosophical discussions should be seen. This special plea which I had already formulated

[1] *Ferri*, "Teoria dell' imputabilità." It may not be profitless, in view of the polemic artifices of certain adversaries, to state once again, that I maintain now only the first part of this book, which I wrote when I was only twenty-two years of age and I have republished it in "La negazione del libero arbitrio ed altri saggi" (Turin, 1900). But the second part (the theory of imputability), does not any longer correspond with my scientific ideas, which have been developed and completed by submission to the proofs of scientific observation. It contains only an imperfect formulation of a theory which is correctly stated in this Part III.

and developed in 1878 is so striking that it has already impressed the Italian legislator who in announcing a desire to follow the traditions of the classical school has nevertheless recognized that the formula of the liberty of election is "too abstract, too much disputed, and too much controverted to become the cornerstone of penal responsibility." [1] Philosophy itself, moreover, and academic criminal science are making concessions, notwithstanding that even in scientific evolution "natura non facit saltus."

§ 206. Equivocal Meanings of Moral Liberty.

I have referred [2] to the eclectics in France who now implicitly declare that "to take free choice as the basis of responsibility is to enter theoretically and practically upon a road without issue by relying upon an element whose presence is most frequently a mystery and escapes all the determinations and measures of which life has need." [3] Notwithstanding this declaration, which expressly excludes free choice, the equivocation remains, since where they still speak of "liberty" the sense is vague and they do no more than displace this mysterious point of psychic being, where consciousness discloses to us the unity "individualized" and integrated by the word "ego" itself.[4] This may suffice as a play upon words but it clearly fails to solve the problem which admits of no middle term between free choice and determinism. Or again, "liberty" is understood to be simply the physical liberty which consists in the absence of obstacles to the development of personal tendencies and activity in so far as they are developed by the constitution of the individual and environment. On this point we are perfectly in accord, but then we have reached full physical and moral determinism. In this sense the waters of a river are free too where no dam prevents them from flowing according to the determining law of gravity. It is for this reason, no matter what certain adversaries may say in mistaking the different significations of the word "liberty," that the negation of moral

[1] "Relazione ministeriale sul progetto di codice penale" (Rome, 1887), I, 163.

[2] *G., ante.*

[3] *Moriand*, "La question de la liberté et de la conduite humaine" (Paris, 1897), p. 194; *Cuche*, "De la possibilité de l'école classique d'organiser la répression pénale en dehors du libre arbitre" (Grenoble, 1897); *Saleilles*, "Individualization of Punishment" (Little, Brown & Co., 1911), p. 140. Such a rabid spiritualist as *Brunetière*, R. D. M. (1st November, 1891), holds with a concealed spiritualist like Tarde, that the basis of legal responsibility does not require free will. Another spiritualist, *Proal*, took him to account for this, "Le crime et la peine," p. xxx.

[4] *Saleilles*, "Individualization of Punishment" (Little, Brown & Co., 1911), p. 140.

freedom which does not exclude either the physical liberty of movement nor the liberty of the development of each one's hereditary personality, in a given environment, excludes none of the liberties (in the physical order) of the citizen, such as personal freedom to come and go, civil, religious, or political liberty.[1] So true is this that only in epochs and by men metaphysically committed and intolerant of discussion of the moral freedom of the human will, were civil, religious, and political liberty outrageously denied and trampled under foot. Or, again, by this equivocal "liberty" there is understood a kind of attenuated free choice, diluted, shorn of its most palpable contradictions by actual data, and the same error arises, and through excess without the advantages of a candid and open determinism, all the inconveniences of the old free choice of the metaphysicians result. There is nothing really logical and conceivable except absolute freedom of choice and absolute determinism. Every intermediate conception is unsound, and whatever satisfaction it may give to the instinct of utility in personal eclecticism, which, among tried people, lovers of tranquil life and undisturbed surroundings, is one of the most common forms of mental timidity (when it is not a means of picking one's road) and in any event, only raises difficulties at every step.[2] If finally we understand [3] this vague and equivocal word "liberty" as the internal energy which every

[1] This is exactly the sense in which *Ardigo* says, in "Sociologia" ("Opere," Padua, 1886, IV, 35), "Liberty consists in that wherein the coördinate part of society can function, following its natural disposition, which fits it to function."

[2] Three writers, among many, agree upon this, although taking points of view diametrically opposed. They are *Fioretti*, "Per il determinismo," in the "Rivista di giurisprudenza" (Turin, 1885), p. I; *Innamorati*, "I nuovi orizzonti del diritto penale e l'antica scuola italiana" (Perouse, 1887), p. 196; *DeBade*, "Une question touchant le droit de punir," in the "Revue néo-scholastique" (February, 1897). Among numberless essays of eclectic theory, I will only mention "La liberté morale" (Paris, 1888), by *Joyau*, where it is said that freedom does not mean free will in the spiritualistic sense, but only "the power to determine to do right willingly. To do evil voluntarily seems to me impossible"; p. viii. This is the old Socratic idea that man does wrong only through ignorance or error, believing that he is doing right; but this belief is without scientific base, unless it means that the delinquent intends his own good. For, we need only to recall what criminal psychology teaches that certain delinquent or insane (in case of diseases of the will with minds unimpaired), either habitual or congenital, know that they are doing wrong, and yet commit the misdeed, through lack of repugnance to it. For the eclectic sense (of relative liberty "as a synthesis of the ideas of freedom and necessity"), see also *Naville*, "Le libre arbitre" 2d edition (Paris, 1898), and *Torantino*, "Saggio sulla voluntà" (Naples, 1897).

[3] Ideas recently sustained by *Van Celher*, "Die strafrechtliche Zurechnungsfähigkeit" in the "Deutsche Juristenzeitung" (1897), p. 2.

man possesses to develop in an entirely individual way, peculiar to himself and different from others since each has a special physio-psychological temperament, which causes him to react in a special manner to the different environmental influences, then we are also in accord. But from that position it is sought to make argument to the effect that determinism reduces man to the condition of an automaton and all nature, physical and moral, to a mere fatalistic mechanism. Therein is an error: for on the contrary, it is because all human action is the necessary and inevitable effect of determining causes that each man has his own personality and physiognomy, both moral and physical, by which he is distinguishable from every other being and by which, also, the same external causes being present, he responds in a manner peculiar to himself, different from that of other men and differing also in himself with varying conditions of time and place, since the condition of the organism changes. For this reason every act performed by a man is his own act as the index and necessary effect of his organism and personality. The first germ of imputability in the physical sense is that whereby we begin to impute to every man and to put to his account the acts which he has physically done.

§ 207. Examples of Equivocal Meaning of Liberty.

Let us take some examples. Let us suppose that we have two sewing-machines of a given system. Once put in motion they respond and react constantly in furnishing equal work to sew the material in a special way. The external motive cause constantly obtains an equal reaction from these machines in every circumstance of time and place. If, however, we take two plants of the same species and variety and put them in the same field under the same temperature and with the same nourishment, we do not get identical reactions. One grows straight, the other crooked; one grows vigorously, the other withers. Now the reason of this is that with inorganic machines the ultimate reaction depends solely, or at least principally, upon the exterior causes, for each, as Spencer remarks, has its own physiognomy and constitution even when the construction is identical;[1] whereas among organic beings of the vegetable order, the action of inter-

[1] *Spencer*, "Essays," III, 272. In "La bête humaine," *Zola*, who, for the first time, introduced the born-criminal (in place of the insane criminal or one by passion) into art, says that every locomotive engineer learns through experience the "mechanical temperament" of his engine.

nal and physiological causes is combined with the action of external causes and therefore these two series of elements combining in different ways may, and do, give different reactions, even when the exterior causes remain the same. To ascend from the vegetable to the animal world and to take for examples two dogs of the same breed and the same age, we see that stimulated by the same exterior cause, such as the sight of a man, they respond in very different ways: one runs away or barks, the other caresses or bites. The same dog at different times responds or reacts differently to the same exterior cause. Here the differences of ultimate reaction may be even greater than in the preceding case. If, in the case of the machines, there are only exterior causes, and in the case of vegetable organisms external causes and internal physiological causes, there are in the case of animal organisms both of these causes and internal psychological causes in addition. It is, therefore, natural that with increase in the series of factors, the number of their possible combinations should also increase and consequently that the ultimate reactions for the same external cause would be more varied. In leaving the vegetable kingdom, and ascending in the zoölogical scale, the differences are multiplied for different individuals and for different moments in the life of the same individual, because the physiological and psychological elements are more developed. Hence, if we take two men in the same moment or the same man at different moments we shall find that there are very great differences in his reactions to the same exterior cause; not that there is innate in man some new element of moral freedom, but simply because the psychic factors of action are more developed and complicated. Every being, and hence every man, has a peculiar and special manner of responding to exterior influences. It has a necessary dependence for each moment of life upon the exterior conditions combined with the physio-psychological state of the organism. To give precision to this thought by an apparently unusual phrase, it could be said that man is a machine but he is not made like a machine. He is a machine in the same sense that in his acts he supplies nothing more than what he receives from his physical and moral environment. Like every other living being, he is only a machine subject to the universal law of causation by virtue of which, at a given moment, in a given combination of physiological and psychic causes, he must react in a given determinate manner. But he is not made like a machine. He is not an inorganic mechanism

for the very reason that he is a living organism with his own special manner of responding to external causes. His response is in each case necessarily determined by the physical and physio-psychological causes which have gone before. The response is variable, and hence often impossible to foresee in different individuals or in different moments because of the various combinations of these manifold determining causes.[1]

§ 208. Denial of Free Will is not Fatalistic.

It is, therefore, a mere illusion to think that the negation of free choice makes of man an automaton, subject to Moslem fatalism. So far are men from being automatons that each has his special manner of reaction against the exterior environment. Such variety does not exclude but demands physical and moral determinism, since otherwise, if man possessed a freedom which made him more or less independent of determining causes, one could no longer understand personality itself as the permanent type of individual character.

§ 209. Limited Moral Freedom; Conclusion.

To return to the eclectic hypothesis of limited moral freedom, it is not easy to be content with a theory which is so strangely refuted in our day and according to which "man is subject to general laws; but within the limits of these laws, which are the conditions of universal life, he retains a relative liberty sufficient to keep intact the principle of individual responsibility." [2] Seek as we may for what basis of solidity there may be under the verbal appearance of this gratuitous declaration, the question arises at

[1] This positive manner of considering the physio-psychological organism of man lends itself to the solution of other sociological problems: for example, eight hours' labor. If man were an inorganic mechanism, it is certain that by working twelve hours a day he would produce twice as much as by six hours' work. But, although this is true for all inorganic machines (and yet machines have need of repose), it is not true for man, who is an organicorphysio-psychological working machine. A workingman who works fourteen hours per diem does not produce twice as much as he who works seven hours, because the last hours are poisoned by muscular and nervous fatigue. This accounts for the fact that most accidents occur during the latter period. Shorter working hours, which have been tried in some industrial establishments, prove that an eight-hour day (because of the decrease in fatigue and the psychic encouragement of a short day) does not diminish the quantity (not to speak of the quality) of the product to a degree harmful to the profit of the capitalist. See *Ferri*, "Socialismo e scienza politica."

[2] *Prius*, "Criminalité et répression," p. 39, and "Science pénale et droit positif" (Brussels, 1899), p. 162.

once what and where are the limits of general laws. If a law, the condition of universal life, merits the name, such as the law of gravity, or the law of causation, there are no limits to its application and it admits only of apparent exceptions. A gap between one law and another in which this last remnant of relative liberty might take refuge cannot be admitted. Moreover, admitting that the moral freedom of man is limited, there arises at once this problem for which there is no solution. In human activity, which is a continuous total, does determinism pass into moral liberty by a sudden leap or by a gradation of indistinct shades? This is a decided difficulty. Since it is a principle of these criminologists that imputability exists and expands in proportion to the moral freedom of human activity, it is necessary as soon as possible to separate the part imposed by necessity, and, hence, not imputable from the part still supposed to be morally free and imputable. Again, all of the arguments of fact produced against absolute free choice apply with equal force to limited free choice for the logical and experimental objections which are valid against a meter of free choice are also valid against a centimeter of it. Then we are face to face with another insurmountable difficulty: why is this moral liberty of man limited and suppressed by external and internal circumstances up to a certain point and not beyond it? Given the influence of climate and race on the criminality of a people and the influence of annual climate, agricultural production, and density of population, it follows as a necessary consequence that the judge, in harmony with the theory that he must grade offenses according to degrees of moral liberty, should include in his calculation a number of elements and factors external to the individual. It would be necessary for him to consider the degree of latitude where the misdeed was committed and the reading of the thermometer; he would have to measure the cubic feet of fresh air at the disposal of the offender, perhaps forced to vegetate in a squalid hovel and curl up on a miserable pallet crowded with adults and children; he would have to estimate that part of the criminal impulsion traceable to the lamentable conditions of the family and social environment; finally, it would be necessary for him to risk himself in a chimerical enterprise of physical, physiological-psychic, and social evolution entirely beyond human ability.[1] If you take into account

[1] So said *Fouillée*, in "La science sociale contemporaine" p. 305, who, however, is an eclectic. This shows the inanity of the work of certain eclectics, for example

age, sleep, the affliction of the deaf mute, intoxication, why should you refuse to calculate also the degree of instruction and of education, the profession, civil state, domicile, economic situation, and sanguine or nervous temperament of the accused? Are these four or five recognized circumstances, which are apparent the only ones that may influence moral freedom and hence moral culpability? If all the circumstances are taken into consideration, what becomes of the residuum of moral freedom which is considered indispensable as the legal basis of human responsibility? And with this traditional system of a more or less complete moral imputability, how can there be a single judge who is not lost in this hopeless labyrinth? Familiarity with the weak avowals to which the eclectic partisans of "relative liberty" are reduced suffices to show it is not tenable.

§ 210. Limited Moral Freedom Impotent to Sustain Criminal Law.

Prius maintains that between men relatively normal (to whom normal repression should be applied) and men absolutely abnormal (as shown by pathology) "there is an intermediate zone of degenerates, of incomplete neurasthenic, ill-balanced beings for whom the problem of responsibility cannot be stated and if stated cannot be solved." [1] It is evident that such language proclaims the theoretical and practical impotence of penal justice founded on this archaic remnant of relative liberty or mutilated free choice. And this is not the worst of it; for the reply may be made: "Very well, we will take into consideration these newly discovered factors of crime to the extent that our knowledge permits. You make our task more difficult, but you do not prove its absurdity." Herein lurks a real and serious social peril, an unavoidable consequence of the doctrine of limited or relative liberty, for it follows, from this doctrine, on the one hand, that the least dangerous are nevertheless the most severely punished, since in their slight offense there is no examination into their psycho-pathological conditions, which, on the contrary, are gone into where there are more serious offenses committed by more

of Alimena, who, publishing in the year of grace 1889, three large volumes on "the limits and modifications of imputability," wastes his time examining the traditional circumstances, capable of modifying and measuring human responsibility which our grandfathers have catalogued in their works on criminal science as if criminal psycho-pathology and sociology have taught us nothing new on the genesis of human acts.

[1] *Prius*, "Science pénale et droit positif," No. 275, p. 166.

abnormal and more dangerous evildoers. On the other hand, the latter are, as we see every day, illogically acquitted or given greatly reduced punishment in connection with dangerous manifestations of atavic criminality. They have so upset the penal justice of our times that the necessity of applying a remedy is not always obvious.[1] There are only two possible means of remedying it: either a complete return to the former absolute theories of free choice, or a candid and complete acceptance of all the results and conclusions of the positivistic sciences. With the system of limited free choice it is impossible, as is constantly more clearly seen, to avoid social and individual dangers and absurdities. The very evident reason is that the principle that the moral responsibility of man expands and shrinks in proportion to an elastic free choice, is a recognition, on the one hand, of an undisputed freedom of choice among the authors of slight crimes (who are nevertheless worthy of comparison), and, on the other hand, an admission of it only in an extremely attenuated form in the most inhuman criminals. Herein lies the danger and scandal of the acquittals by which the latter profit. Counsel for the defense will always find a quantity of personal, physical, or social circumstances to destroy or diminish the moral liberty of any man charged with an unusual and savage crime, and which, exactly as the classicist, Rolin, says, "shows more and more how uncertain is his responsibility." [2] They have gone so far as to make this absurdity, danger, and iniquity a theory and general rule. That has been done by the Review which is the organ of the classical jurisprudence and by its director Luccini, who, with the "Simplistes du droit pénal," translated into French if you please, has undertaken a systematic refutation of criminal sociology. This Review has maintained the thesis that the new penal code should establish a mitigation of penalties and even (conformably with the opinion of certain German jurists) the complete abolition of all perpetual punishment [3] for all delicts (therefore even for the atavic forms of criminality). On this account, Garofalo [4] replied in the name of the positivist school by contesting this tendency to an indefinite mitigation which really threatens to go so far as the complete acquittal of the most inhuman criminals, it being

[1] *Rolin*, "La pena di morte" (Lucca, 1871).

[2] *Ibid.*, pp. 35, 36.

[3] R. P. May, 1882.

[4] *Garofalo*, "I pericoli sociali di alcune teorie giuridiche," in the "Archivo di psychologia e scienza penali," III, 4.

understood that forgetting the honest victim, they generalize on the argument of Holtzendorff who, replying upon the fact that the value of personal liberty has increased, would punish the assassin with only a temporary penalty.[1] They forget, as Barzilai well said (also in the name of the positivist school), that the liberty and lives of the victims have also increased in value.[2] Following the same road, they propose to concede to the jury the legal faculty of allowing extenuating circumstances.[3]

§ 211. Theory of Limited Moral Freedom in Practical Jurisprudence.

If we pass from the field of science and legislation to that of practical jurisprudence, we find that in trifling occasional delicts, where less notice is taken of these physio-psychological anomalies, necessarily more obvious in the dangerous criminals, the ancient severity of penal justice exercises all the absolutism of the old theories of responsibility. Thus we observe the present spirit of penal justice suffering from a double error and a twofold demoralization, since by a misunderstood application of the new scientific data, it offers the most improvident impunity or indulgence to the more dangerous criminals, keeping its severities, as disproportionate as they are harmful, for the less dangerous, that is, for occasional criminals. Public opinion, ill-informed in these matters and always hostile to innovation, at the beginning imputed to the new criminal school a tendency towards the impunity of all criminals (an imputation made against the school of Beccaria a century ago). On the contrary, the tendency to an exclusive exaggerated and ever-increasing clemency for the more formidable criminals is the actual result of classical penal law, mixed with a few of the most obvious results of the physio-psychological sciences.

[1] *Holtzendoff*, "Das Moral und Todesstrafe" (Berlin, 1875), p. 225.

[2] *Barziloi*, "La recidiva ed il metodo sperimentale," R. C. (1883), p. 462.

[3] *Bozerian*, "Projet de loi sur les circonstances très atténuantes," presented before the French Senate, April 4th, 1885, "Bulletin de la société des prisons" (1885), p. 95; *Grandperret*, "Les circonstances très atténuantes," *id.* (1886), p. 508; *Berthear*, "Réformes pratiques" (Paris, 1886), p. 46, who combats the proposition; *Hugues*, "La cour d'assises et le nouveau code d'instruction criminal" in "France judiciaire" (1887), No. 7; *Leloir*, "De la fréquence des acquittements et du projet de loi sur les circonstances très atténuantes," *id.* (1887), p. 65, and 1888, p. 46, who is also opposed to the project.

CHAPTER II

THE PROBLEM OF PENAL JUSTICE WITH THE DENIAL OF FREE WILL

Natural defensive reaction. Present reaction. Ethnical character of retributive justice eliminated from the defensive function. Freedom of this function from criteria of liberty and moral defects.

§ 212. Penal Law Denying Moral Liberty.

Aside even from the palpable refutations by physio-psychology of the presupposition of free choice or moral liberty, we have seen how fully the theoretical and practical impossibility of resting man's responsibility for his crimes upon free choice, either absolute or relative, is proven. But then, if man commits misdeeds not by the free choice of his will, but by the fatal tyranny of his abnormal organism and his environment, the question arises, how can he be punished and made responsible for faults which are not his? Open the prisons and close the courts, because partisans of the positivist school deny and exclude the free will! If you cannot decide to do this, since the thing is too absurd and perilous, you can no longer talk of penal law and punitive justice except by formal contradiction of terms. Such is the ordinary objection, as spontaneous as it is ill-founded. It is made by all those who believe themselves able to solve such problems off-hand by following the first impressions of sentiment and of all those who are unable to free themselves from the natural and deceptive tendency whereby, as Bain observes, "every novel manner of conceiving a thing or a problem is taken as its negation." [1]

But such is the true problem, the fundamental problem which presents itself to the new science of crimes and punishments. It would seem that it is incapable of solution or capable of it only by syllogistic subtleties. Yet it has a clean and accurate solution in the mere investigation of social facts which always have sought and always will seek their genesis and justification in the natural conditions of human life and not in the

[1] *Bain*, "The Mind and Body."

metaphysical theories of jurists. Before taking up the solution of this problem by the mere light of social facts we encounter a preliminary question as to method which will seem to put us on the road. The observation is this: The point of departure and pivot of this problem being the negation or exclusion of all idea of moral liberty as the condition or measure of responsibility, it follows that to be logical and avoid difficulties and contradictions exactly similar to those from which we are endeavoring to escape, the problem must be transported to a field entirely different from that wherein it has heretofore remained. Social theories are not like those American houses which may be moved from one place to another and rest upon their new foundations just as firmly as upon the old. Penal justice is founded either upon the idea of free will (whether absolute or relative, explicit or implicit, makes little difference) and hence may continue to rest upon the ancient criteria open at most to a few partial superficial reforms; or else penal justice is founded upon the natural determinism of human acts and consequently upon the data of anthropology and criminal sociology, therefore requiring radically different criteria to be sought in corresponding institutions and judicial and administrative mechanism. The eclectic tendency, on the contrary, through its stubborn tenacity, would keep the foundation without changing anything and content itself with verbal innovations. Nevertheless, the point of arrival must completely change where the point of departure is so completely displaced. This idea (elsewhere indicated) [1] I propose to develop if only to satisfy the preliminary question.

§ 213. Basis of Responsibility.

There are two orders of facts necessary and sufficient to define the problem of responsibility according to the method of the positive school, that is, of the conditions, where the individual is passive to measures of preservation and defense which can and

[1] "Il diritto di punire come funzione sociale," in "Archivio di psichologia e scienza penale" (1882), Vol. III, Fasc. I. *Hamon* is wrong, therefore, in his "Déterminisme et responsabilité," p. xi, when he says, "in relation to responsibility and penology no one of the partisans and followers of the school of Lombroso has gone to the logical conclusion of the doctrine." For his conclusion that moral irresponsibility is the consequence of determinism, and that, therefore, all beings are (morally) irresponsible, was developed by me in my second edition in 1892, in the third chapter, which follows (like the other parts of the book) without fundamental change.

must be undertaken by the State, with reference to offenses committed by him. (*a*) As in every other natural research pursued in accordance with the doctrine of evolution, the first thing is the matter of origin and development, whether it be the punitive function, or the organs whereby it is exercised in the progress of time. These past facts will give us the genesis and explanation of existing facts. (*b*) The second thing is the examination of the social facts concerning responsibility, facts that develop every day and which lie outside of all the theories metaphysical jurists can construct in their closets with however logical and symmetrical order but yet with an altogether philosophical forgetfulness of the realities of life.

§ 214. Need of History to Determine Basis of Responsibility.

A geologist and a zoölogist who wishes to explain the wherefore of the actual configuration of the globe or of the living fauna would in our day be ridiculed, if he limited himself (as for a long time the classical schools of geology and biology did, not without advantage in their preliminary study) to the mere descriptive examination of existing forms. On the contrary, they succeed more and more in dissipating the shadows surrounding the mystery of life and obtain results of prodigious value when, following the glorious paths of Lyell and Darwin, they fix their gaze on the prehistoric epochs buried for many thousands of years and demand of these and the external succession of living species the key to so many secrets. Sociologists and criminal sociologists must do the same for the same reasons. They cannot confine themselves to purely descriptive and syllogistic anatomical researches (the field of the classical criminal school), to researches in delinquency and criminality such as they appear to-day in civil society or as they are observed denuded in the microcosm of history. They must seek in the most remote manifestations of life the elementary and distant germs of the penal function so complexly constituted, which must be regulated according to the exigencies of actual life. For this reason, on another occasion, in studying the crime of homicide according to the criteria of the positive school, I thought it necessary to seek in the prehistoric ages of human life the germs and natural evolution of that criminal act and the penal reactions provoked by it.[1] Every living creature struggles for its existence; hence, every act which attacks

[1] *Ferri*, "L'Omicidio," Introduction.

his natural conditions of individual or social existence determines a defensive reaction on his part which is direct when the harmful consequences of this attack can be then and there avoided, and indirect when by punishing the author its repetition can be avoided. This is the primitive, irreducible, elemental fact. It constitutes one of the basic characteristics of organized or living matter. It is woven into the essential conditions of sensibility and movement. It is shown in the most elementary forms of life, in the simple protoplasm as in the plant. Step by step it follows all the successive complications and attains the most complex and highest forms of individual and social defense, direct and indirect. In its progress it is complicated with other physical and psychic elements, in the means of defense and in the feelings and ideas which accompany them and which are transmitted by heredity. But it always retains the primitive base just indicated.

§ 215. Evolution of Defensive Reaction.

Biology and sociology, far from being in a mutual relation of succession or of real and strict independence, are concomitants and parallels, since animal life from the beginning is shown in a double series of individual and social organisms.[1] Regardless therefore, of the changing and distinct predominance of the individual or social form in the different phases of human evolution, we still see both forms of defensive reactions constantly occurring everywhere that we find animal and human life. Of this we find an indirect proof in the constant observation that in all of the manifestations of social life, all different forms and diverse types coexist with the successive predominance of one over the other. It would be erroneous to believe that the different forms of sexual and family relations (promiscuity, matriarchy, patriarchy, polyandry, polygamy, and monogamy) were successive, one institution taking the place of another. They have always coexisted and still coexist even in civilized society, now one, now another, has predominated, and that in the order indicated, but without, for example in Western Europe, the exclusion by monogamy (the legal and predominant form) of extra-legal forms of polygamy and polyandry. The same may be said of the forms taken by property in land (collective, communal, and individual), which still coexist in spite of the excessive predominance of the individual

[1] *Rabbeno*, "Dei rapporti fra la biologia e la sociologia," in the "Rivista di filosofia scientifica" (March, 1883).

form.[1] The same is true of political forms and in general of the different types of social constitution under the two opposite (war-like, military, and pacific-industrial) forms. In like manner, the individual and collective forms of defense have always existed and still exist, although one or the other has always predominated. Even in the lowest animals, in the protozoic kingdom, defensive reaction under the form of irritability is observed not only in the individuals taken separately, but also in the animal colonies which react in cases of collective perils; and in such cases they always react under the form of social defense. This becomes more evident as we ascend in the zoölogical scale and find social life under forms more nearly approaching those of humanity and the association of individuals more and more developed in the organic and psychic relation. Furthermore, even among animals, especially among the more intelligent mammals, we already reach the higher phase where social defense is no longer exercised by the collectivity but by its chief. It is exercised certainly in a personal interest, but in a collective interest at the same time, exactly as happens in savage or barbarian society. Indeed many herbivorous mammals live in society and there is then always an individual who exercises a certain authority over the others, who guides and defends them. This is true of elephants horses, buffaloes, and apes.[2] Now this evolution of defensive reaction is repeated in an entirely analogous way among men. There are savage tribes where individuals live isolated without any chief and among whom every attack on the conditions essential to existence produces in the victim a purely individual and transitory reaction, not subject to any tribal rule and regarded as a purely private affair. The sole judge who decides whether an act is or is not criminal, that is, harmful or dangerous, the sole executioner of the judgment, is the individual attacked who

[1] *Lavellaye*, "Les formes primitives de la proprieté" (Paris, 1888); *Letourneau*, "L'évolution de la proprieté" (Paris, 1889).

[2] *Brehm*, "La vita degli animali," Italian translation, Turin, 1872–1875, Vol. I, pp. 29, 46; *Espinas*, "Les sociétés animales" (Paris, 1878), 2d ed., p. 450. Facts show how inexact are the "a priori" statements of *Letourneau*, in "L'évolution juridique dans les diverses races humaines" (Paris, 1891), p. 13, where he says that bees and ants have "an absolute attachment for the collectivity, which protects them from every anti-social temptation," and that consequently, they have no "juridical instinct," lacking the need of it. Furthermore, however, at page 15 Letourneau contradicts himself, for, while stating that in general "animals lack a juridical sense," because, he says, in order for them to have it, the sentiment of defense would have to be transformed into one of vengeance, and yet he later cites cases of vengeance in animals.

reacts with the intent of present and future defense; and, provoked by resentment and desire for vengeance, which already exists among the animals, he usually exceeds all bounds. This is what happens, for example, among the anarchic tribes of central Africa, among the Caribs, Fuegians, North American Indians, and Esquimaux.[1] The defensive reaction under this individual form may (as Puglia remarks) be shown in two different ways; either as an immediate and instantaneous reaction at the moment of aggression; or as a repressed reaction delayed for a more opportune time, which is, strictly speaking, a real vengeance, according to Puglia,[2] whose distinction agrees with the facts. It is the psychological reflection of the distinction which we have just made between direct and indirect offensive reaction. But this difference does not mark two successive epochs. In the first place, proof of succession is lacking, and, in the second place, it is easy to believe that in each case the temperament of the injured and the opportunity presented determined the promptness or the delay of the defensive reaction among primitive men, as, indeed, among the higher animals (Darwin has cited instances of this).[3]

§ 216. Identity of Military and Legal Reaction.

Spencer[4] makes an important observation on this subject when he points out the primal and fundamental identity or intimate analogy between the defensive reaction against a foreign agressor (military defense) and against a domestic agressor (legal or judicial defense).[5] We come upon this indentity not only in the facts of human sociology reported by this great philosopher but also among the facts noted in the sociology of animals. Indeed, among these, the individual or collective reaction is produced in the same manner and for the same reasons, whether the agressor belongs to a strange tribe or is a member of the same society. In primitive humanity, as Spencer says, we notice, especially when the judicial defensive reaction begins to prevail as a social

[1] *Lubbock*, "Les temps préhistoriques et l'origine de la civilisation" (Paris); *Letourneau*, "La sociologie," pp. 444 *et seq.*, and "L'évolution juridique dans les diverses races humaines," Chap. I, § VI.

[2] *Puglia*, "Evoluzione storica e scientifica del diritto e della procedura penale" (Messina, 1882), pp. 30, 31. Likewise, *Zocca-Rossa*, "L'etâ preistorica del diritto penale a Roma" (Catane, 1883), pp. 9 *et seq.*

[3] *Darwin*, "Origin of Species."

[4] *Spencer*, "The Principles of Sociology."

[5] *Darwin*, "The Origin of Species." Likewise, *Spencer*, "Bases of Morals."

and permanent function, its motive principles and organs of execution are the same as those of the military defense but that it departs therefrom and differentiates more and more in the ultimate phases of its evolution. This community of origin, which even the living language preserves and reveals in the traditional expressions — the sword of justice, a public enemy — used in purely judicial matters, is observable as an atavic return, when in times of social upheavals, the dominant class resorts to the creation of extraordinary military tribunals to judge and condemn not so much the actual criminal material acts (homicide or arson) as mental crimes of political heterodoxy. It is, however, natural that the transitory and excessive individual form of defensive reaction and vengeance should early begin to yield to the coexistent social form. This occurs first in the direct reaction of the collectivity, afterwards in an official duty exercised by the chief in the name of the tribe. This is unavoidable on account of the social interest in order to prevent (as Darwin says) [1] a tribe decimated either by enemies from without or, what is still worse, by its own members from losing, with respect to other tribes, the forces necessary in the struggle for existence. Individual reaction being in its nature excessive and in turn provoking new and sanguinary reactions, the collectivity quickly feels (as Spencer remarks) the need of suppressing or limiting these continuing causes of weakness. The predominance of "public vindication" over the vengeance of individuals begins with a mere interference by the collectivity in private quarrels, giving place to the judicial rules and institutions of feuds, composition, and protection to the wrongdoer himself when threatened with the excessive reaction by the victim. These customs which we find among many savage tribes and which once existed in the civilizations of Mexico, Greece and Rome, the Orient, and in Europe of the Middle Ages, although they to-day seem to represent a barbarous state of penal justice, were in their own times a great moral and social progress in restraining the excessive violence of the reactions of individual or family vengeance. The punishment of crime like military defense [2] finally becomes an exclusive attribute of the State. This unquestionable portion of truth is con-

[1] *Darwin*, "The Origin of Species," Likewise, *Spencer*, "The Basis of Morals."

[2] For interesting historical date, see *Cherry*, "Lectures on the Growth of Criminal Law in Ancient Communities" (London, 1890), and republished in the "Scuola positiva," 31 July, 1891, p. 276.

tained in the system of such writers as Rousseau, Beccaria, Filangieri, and others, who hold that the State's right to punish is based on the grant by all the members of the association who reassume this right in a transitory way when the State is unable to exercise it for their protection (as for example, in the cases of self-defense). Although Fouillée, de Greef, and other sociologists to-day rightly give great importance to the contractual element in social organisms, the inaccuracy of that theory and the part now rejected is the artificial character given to the processes whereby the reaction of defense and vengeance ceased to be individual and became social. Considering the different forms of defensive reaction from the simplest movements of the individual up to the high punitive function of the State, and observing the organs of this function, we note that they only begin to form when the transitory acts, whereby the injured individual or society react, have been replaced by a permanent duty reserved to the chief of the tribe. At the beginning he is not only law-giver in cases where custom has as yet imposed no rule; but he is judge and executioner of his own sentence. This is the prehistoric germ of the principle afterwards repudiated by science — that justice emanates from the king. Later in the ulterior stages when the social body has become more complex and its functions more complicated, the chief of the tribe delegated to a few ministers first the execution of his administrative or judicial orders and finally the right to insure judgments and decrees. These minsisters and agents of his will, in whom at first because of the identity between these two functions the military character was united with the sacerdotal (as in the chief of the tribe who is always both commander-in-chief and high priest) finally became magistrates of an exclusively judicial character due to the incessant differentiation taking place in the functions and the social structure. This is exactly what we observe among civilized peoples.[1]

[1] See proof in *Spencer*, "Principles of Sociology, Vol. III, p. V, Chap. XIII, and "Professional and Industrial Institutions," Chap. VII. See also, among criminologists, *Ellero*, "Delle origini storiche del diritto di punire," in "Opuscoli criminali" (Bologne, 1874); *Rolin*, "Les phases du droit pénal," in the "Revue internationelle" 1882, I. For the survival of this primitive state without distinction between judiciary organs and functions, see *Ou Tsouglieu*, "L'organizzazione penale della China," S. P. (January, 1889), and "De la responsabilité des autorités locales en cas de délits commis par leurs administrés," A. C. A. C. (Brussels, 1893), p. 385.

§ 217. Penal Lack of Recognition of Morality of Act.

This constant fact of the coexistence of the military and sacerdotal characters in the organs of the defensive and repressive function, among all the primitive peoples, enables us to give the positive explanation of a fundamental characteristic which is fixed and constant in the primitive administration of society and the science of which it is the object. When the defensive reaction is exercised in the individual form, it is evident that its sole and basic motive lies in personal benefit to the offended person and his irresistible tendency towards his own preservation. The animus, as a characteristic of moral perversity in the agressor or delinquent, is an element that is ignored by the individual reaction as foreign to it. This is true not only in the primitive and savage stages of humanity, but in every society, however advanced it may be. Furthermore, in the beginning of society the social reaction itself, whether exercised directly by the collectivity or indirectly by the chief of the tribe, has no other motive or criterion than social utility, the necessity of preservation. Even then the malice of the agressor is an element foreign to this defensive reaction, an element of which it is ignorant.[1]

[1] For this, see *Steinmetz*, "Ethnologische Studien zur ersten Entwickelung der Strafe" (Leipsic, 1894), Vol. II, where the "non-international" quality of punishment is established. See also *Holmes*, "The Common Law," Chap. I, "Primitive Forms of Responsibility," a very interesting book, because it shows the profound and essential difference between the "juridical feeling" of the Latin and the Anglo-Saxon peoples. For while the Latins believe that the general principles of law can only be conceived of as the final and degenerate forms of Roman law, the Anglo-Saxons, although they, too, have felt its influence, have an entirely different juridical sense. An almost daily example of this is the different way of looking upon reparation in damages for torts. It is of interest to note that the general theories of the positive criminal school follow Anglo-Saxon juridical thought. Take, for example, reparation in damages, which the Latins look upon as a social function, rather than a private right. It is the same with the theory of responsibility, born of the natural spirit of vengeance, which the Latins deprive of every quality of objective reality and unfit for the necessities of existence. So with the theory of defamation; the positive school would punish such an act only when it was determined by motives of social interest instead of anti-social motives or personal interest, such as hate, cupidity, or vengeance. This distinction of social motives is allowed in common law "for the public benefit." The germ of the theory of natural crime is contained in the distinction made by Anglo-Saxon criminal law between common law and statutory crime, "mala in se" and "mala prohibita." See *Holmes, supra*, pp. 76, 79, 98. This distinction existed in Roman law, whose positive spirit was far different from the metaphysical abstractions of the classical criminal school, and closely resembled the doctrines of Anglo-Saxon law (a new argument in favor of the similarity of Modern England and Ancient Rome) and of the positive school.

The idea of moral culpability as a condition of punishment is first found in the double character, military and sacerdotal, of the chief of the tribe, and later in the ministers delegated by him. When the priests achieved the ascendancy which they have in all primitive societies, they finally appropriated completely the repression first of anti-religious and then of anti-social acts. The defensive or repressive reaction which when exercised by the offended individual had a quality of private vengeance and when exercised by society or the chief of the tribe, a quality of public vengeance, assumed when exercised by the sacerdotal caste, the character of divine vengeance. It ceased to be a purely defensive function in becoming a religious or moral mission with the natural accompaniment of every religion, a strict formalism and especially a mystical spirit of penitence and purification.[1] This rigid and religious characteristic of the penal function, even when it has yielded first in directly political offenses, and then in ordinary offenses to claims of lay and civil ideas and power, nevertheless leaves in its wake (since dissolution like evolution is gradual) the idea that the repressive agency has a function of moral betterment or, in the most advanced state, of retributive justice; because (as Kroepelin says) the mere change of religious precepts into moral precepts does not affect their origin.[2]

§ 218. Evolutionary Phases of Law.

We may therefore conclude that penalties (and by that word we designate the entirety of legal means used by society in the struggle with crime) have passed through four phases of evolution: the primitive (defensive and vindictive reaction, individual, social, and instantaneous); the religious (that of divine vengeance); the ethical (that of medieval penitence); and the juridical (in the sense of the abstract and "a priori" law of the classical school). It is readily seen that in science and still more in public opinion and in law (which progresses less rapidly), we are in the juridical phase, or more accurately, in the ethico-legal phase of punishment: since all evolution is produced not abruptly but by degrees, and through a series of gradations.

[1] For the religious origin of punishment, see *Steinmetz*, "Ethnologische Studien zur ersten Entwickelung der Strafe," *passim*. And *Mans*, "La religion et les origines du droit pénal," in the "Revue de l'histoire des religions" (1897), Fasc. 1 and 2.

[2] *Kraeplin*, "La colpa e la pena," R. F. S. (1883), II, p. 527.

§ 219. The Last Evolutionary Phase of Law; the Social Phase.

The question now is to inaugurate and realize the social phase where, thanks to the new data of criminal anthropology and statistics of the origin of crime, punishment will no longer be retribution for a moral fault by a proportionate chastisement (ethico-legal phase) but a sum of preventive and repressive social measures, which, more efficaciously and humanely, corresponding to the nature and origin of crime, will protect society from its assaults.[1] The step which we wish taken by the science and legislation of penal law, is, therefore, an advance which will complete the evolutionary cycle by giving to the punitive instrument the natural and spontaneous character of a purely social function, which it had at the beginning and which, let us not forget, is the only one really understood by public sentiment. In this connection it may be remarked that the return to primitive forms or characteristics may also be considered as a constant sociological law in other manifestations of social, economic, and political life. Indeed, as Loria observes, primitive humanity owes to the first impressions of nature surrounding it, the fundamental lines of its existence. With the progress of intelligence and the complications which increase according to the laws of evolution, we see an analytical development of the principal elements contained in the first germs of every institution. This analytical development once accomplished, wherein often different elements are in hostility in passing from one excess to another, humanity itself, attaining a high degree of its evolution, again reunites them in a final synthesis, which includes its primitive starting point.[2] This return,

[1] It is well known that a great number of the most celebrated criminalists through a more positivistic turn of mind have based the right of punishment as "social utility," "direct defense," "indirect defense," "self-preservation," "political necessity," and so forth; but the essential difference between these theories and that of the positive school consists in the fact that Beccaria, Bentham, Romagnosi, Comte, Martin, Schulze, Thiercelin, and Carmignani always had in their system the idea of the moral culpability or responsibility of man, as a test and condition superior to the idea of social necessity, while we exclude it from the juridical and social field, as I will show, *post.* This is the reason that *Geyer*, "Grundriss zu Vorlesungen über deutsches Strafrecht" (Munich, 1884), p. 19, recognized that the new school is more logical than the old utilitarian schools, because it is based on the denial of moral fault, which they admit. See also, *Morrison*, "Crime and its Causes"; "Theory of Criminality" (April, 1889). Even with the contemporaneous classical criminalists, although the part played by the idea of social utility becomes larger, this idea remains, however, is subordinate to the ethical test of human culpability.

[2] *Loria*, "La teorica economica della costituzione politica," p. 141; to the same,

however, is not a pure and simple repetition. It is the completion of a cycle that cannot but contain the effects and conquests of the long-preceding evolution, and, hence, that is far above, in reality and public sentiment, its primitive embryo. As in Goethe's famous simile, humanity progresses like a spiral which seems to come back on itself, but is always advancing.[1] Thus it is that in the economic domain there is to-day a marked trend of property in the collectivist direction (even outside of socialism and the limits imposed by it on the absolute right: "utendi et abutendi") which recalls the primitive forms of collective ownership. A more striking illustration is that of women, who in primitive societies are forced to labor, but subsequently devote themselves solely to domestic cares. To-day they wish, and that rightly, to acquire equally with men the right to labor, although naturally remaining sheltered from the most brutal tasks imposed upon them among savages. Again, according to Hartmann, religions in primitive times thought that a human being could attain happiness in his individual life. Then they placed happiness in the life beyond the tomb. To-day, however, the tendency is to replace it in human life itself, but reserving it for the generations to come. So also in politics (according to Spencer)[2] the will of all, the sovereign element in primitive humanity, yields little by little to the will of an individual; then to that of a small number (these are the various aristocracies, of arms, birth, profession, and wealth); and finally tends to become sovereign again in the triumph of democracy. Hence, in full harmony with this sociological law, of which other illustrations might be given, we are right in demanding that the defensive penal function (often the development given in past centuries and in our own of divers

effect *Cognetti*, "Le forme primitive nell' evoluzione economica" (Turin, 1891), *ad fin.* And *Dramaral*, "Transformisme et socialisme," in the "Revue Socialiste" (February, 1885), § 5, "La loi de régression apparente." This law is dealt with in "Divorzio e sociologia," S. P. (1893), No. 16, in "Omicidio," and "Socialismo e scienza positiva," pp. 97 *et seq.*, 2d ed. (Palermo, 1900). See also Ferri's reply to *Garofalo*, "Discordie positiviste sul socialismo" (Palermo, 1896), and Appendix to the French translation of "Socialismo e scienza positiva" (Paris, 1897), p. 212.

[1] This idea has been sustained by many examples by *De la Grasserie*, "De la forme graphique de l'évolution," R. I. S. (September, 1895); by *Kranz*, "La loi de la rétrospection révolutionnaire" A. I. I. S. (1896), II, 515, and by *Zerboglio*, "Le retour au passé" in the "Devenir social" (September, 1896). *De Greef*, in "Transformisme social," p. 473, raised several objections, but this, it seems to me, was because he took it in the sense of a return, pure and simple, and not of an apparent one accompanied by essential progress. See also *Demoor*, *Massart*, and *Vandervelte*, "L'évolution régressive" (Paris, 1897). [2] Spencer, Sociology III, Chap. V.

component elements and the predominant ethical criterion of culpability) should return to its starting point and again become a social function inspired, not by alien and inaccessible criteria, but by the actual needs of human society, guided by positivist notions of the genesis of delinquency.

§ 220. Development of Penal Law Toward the Defensive.

There remains one indestructible effect of the slowly ascending evolution through which this function has passed in ceaselessly progressing and advancing as it became farther removed from its starting point. It has been divested of all spirit of brutal vengeance to assume the character of a defense pure and simple, imposed by the necessities of social conservation. Perhaps we shall see the continued existence for some time to come of the sentiment of hatred for the evildoer which has so much value in Tarde's eyes [1] as a repellant and preventive moral force. While it has a value in the present phase of transitory morals, still it is but one of the numberless psychological factors interwoven in the origin of crime and this author therefore exaggerates its efficacy. It will continue to grow less until it disappears, as has happened in the case of a similar feeling with regard to the insane. It is not more than a hundred years since madmen were detested and punished, because their insanity was attributed to their will. So, to-day, criminals are detested because the tendency to crime is attributed to moral fault and free choice. Even if a feeling of repugnance is retained for them as for other diseased persons,

[1] *Tarde*, "Penal Philosophy" (Boston, 1912). The author believed that he was interpreting my thought at the Congress of Criminal Anthropology at Geneva by saying that I foretold the disappearance of hate of criminals, as that of the insane, through the effects of time and evolution. "Revue pénitentiaire" (December, 1896), p. 1242. Already, as Gauckler said in "De la peine et de la fonction du droit pénal au point de vue sociologique," in the "Archives" (September, 1893), p. 46, there is a constant tendency in the increase of pity and hence in the attenuation of punishment, so that as *Orchanski* said in "Les criminels russes," A. P. (1878), XIX, p. 1, "instinctive hate of the delinquent is a feeling of inferior man." But furthermore, it is clear that the reason of my thought lies in the scientific proof that we must consider crime (especially in its atavic forms) as one of the forms of human pathology, and not as the effect of an evil will; and this is what happened in the case of insanity. And, hence, if it is true, as Tarde says, that humanity hates or does not hate actions depending upon the quality of the determinant will, it is evident that when crime is recognized as undetermined by evil will, the reason for hating it will disappear. To this effect, see *Jelsgerma*, "Les caractères du criminel ne sont d'origine pathologique," in "Actes du Congrès" (Brussels, 1893) p. 34; *Cobade*, "De la responsabilité criminelle," p. 37; *Vorgha*, "Die Abschaffung der Stretknechtschaft," 2 vols.

hatred at least is inexcusable. It may be said in summary that the study of this natural evolution, wherein from the embryonic fact of a reaction of irritability and animal sensibility we reach the high and complicated entirety of customs, institutions, and laws, constituting the modern puntive agency, we are led to a conclusion made up of the two parts of the same fundamental principle.

§ 221. Penal Function Defensive and Unconnected with Conditions of Moral Liberty.

The first, already more or less recognized by some criminologists and practically admitted by public opinion based on the real observation of everyday facts, consists in the recognition of the punitive agency as a function, purely defensive or preservative, of society.[1] The second, which is novel as an explicit affirmation and on that account at first warmly contested but now accepted as a premise by the eclectics (without the courage to draw from it logically the radical consequences which it involves), consists in the independence of this function with respect to any condition of moral liberty or moral culpability in the delinquent. By this second part, we really penetrate with criminal sociology to the quick of the fundamental problem of human responsibility.

[1] Certainly, this function of defense or protection from crime either individual or social cannot be independent of all rules and conditions, as I will show, answering the criminalists, who constantly reproach us by an accusation as easy as ill-founded, of sacrificing the protection of the accused delinquent to the tyrannical authority of a "wretched social interest."

CHAPTER III

OBJECTIONS TO NEGATION OF FREE WILL

The penalty (after the fact) is not a defense (before the fact). Social defense is not legal defense. Positive origin of law in its individual and social aspect. Social defense and class defense in penal law. Atavic and evolutionary criminality.

§ 222. Objections to Theory of Defensive Penal Justice.

It is well, however, to dispose forthwith of some of the objections, tirelessly directed by even the more recent classical criminologists and by some eclectics, to the principle of social defense and preservation considered as the absolute justification of the penal function without any admixture of other principles to complete and regulate it. These principles are wrongly called "higher principles" (of separative or distributive justice) since it is clear that humanly speaking there is nothing "higher" than the necessities of human life, either individual or social. It is time to abandon forever the superannuated distinctions between the useful (called arbitrary, vulgar, and variable), and the just (absolute, noble, eternal); since both are fundamentally the same thing. What is just is only the useful responding definitely to the natural conditions of human existence at a given time and place and, therefore, distinct from the immediate and transitory utility which does not conform to these same conditions and which alone merits these low qualifications and which the positivists never concede as a rule of life.[1] The objections are as follows: (*a*) The right of punishment cannot be likened to the right of defense, since defense looks to a future fact and punishment regards an accomplished fact. (*b*) The reason of defense or social preservation considered as the sole principle of the right of punishment is a step backward, when compared with the reason of tutelage or judicial defense advocated by the contem-

[1] Among the most recent eclectics, *Saleilles*, "Individualization of Punishment" (Little, Brown & Co., 1911) wrote (p. 4), "The distinctive purpose of criminal law would thus become the economics of social defense; but this formula of the Italian school should be amended by adding: are economics of social defense adapted to the demands of the sense of justice?"

porary Italian classical school, especially when it is considered that social defense can legitimate any excess of power on the part of the State to the detriment of individual rights, whereas defense by law excludes this possibility.[1] (*c*) At all events it is not social defense which is the base and soul of penal justice, but rather the defense of the dominant class.

§ 223. (A) Objections to Theory of Defensive Penal Justice: Reparation not Defense.

When society, in the capacity of a person, as a living collective body repels the attack of an invading enemy we have the case of personal defense directly exercised just as an individual repels a robber on the highway: strictly speaking the right of punishment is not here involved, but the case is one of defensive war. This is also what occurs when the agents of public authority repel in the name of society a direct aggression against one or more individuals: there again it is society that exercises by delegation its personal defense and defends itself in the individual attacked. Hence, when society represses or, using classical language, punishes the wrongdoer for a misdeed already committed, it is not defensive in the strict sense of the word but preservative, since "the right of defense (as Romagnosi has already noted) is but a transformation of the right of conservation," and hence is its equivalent, since defending oneself means precisely to obey and foresee the necessity of self-preservation.[2] The natural evolution of punishment proves by facts that penal justice should have no other function than that of the defense or preservation of the conditions of social existence (individual or collective). It is error for the majority of criminologists to compare real defense properly so-called with social repression; it should be compared with the vindictive reaction of the primitive individual against offenses already suffered.

Criminologists call this primitive instinct of vengeance "providential," and many representatives of the Public Ministry still speak of the social vindication, thus making unconscious allusion to the first origin of the right of punishment,[3] just as many other common expressions remotely recall, as Bagehot says, "the spirit

[1] *Carrara*, "Programma," §§ 611, 815. Parte speciale, Intro., Col. 1, p. 27, "Opuscoli," I, 261, II, 12. And to the same effect, the criminalists of the classical school.

[2] *Romagnosi*, "Genesi del diritto penale," § 49.

[3] *Pagano*, "Principi del codice penale," § 1; *Carrara*, "Programma," § 587.

of warfare which still permeates our morals."[1] Hence, Stephen rightly declared that "the relation of criminal law to vengeance is quite analogous to that which exists between marriage and sex instinct."[2] The individual or collective reaction against criminal acts, which offend against the conditions of the existence of an individual or of the collectivity, is nothing but defensive vengeance. When Ellero writes that "punishment contemplates future offenders and not the one (and I would say at the same time, with the one) that it strikes," he confirms the old adage, "punitur non quia peccatum, sed ne peccetur."[3] Certainly social defense is not the same as personal vengeance since the latter is the first phase of an evolution terminating in the latter. It is an individual and transitory act which becomes a collective and permanent function answering a permanent and collective need. Wherefore Romagnosi said: "The penal function is neither individual nor temporary: it is universal and perpetual for an entire society."[4] Moreover, the very formula "evil for evil,"— which, according to Kant, Moniani, Rossi, Guizot, de Broglie, and others, is the highest expression of absolute moral justice and the only basis of the right to punish, — is but a quintessence of primitive vengeance and talion. The acceptance of the law of talion was a great advance, but it has been left behind in moral evolution. "Ideal and absolute morals" may indeed counsel "one struck upon the right cheek to turn the left"; but the instincts of preservation, defense and personal vengeance impose, on the contrary, a reaction of which "an eye for an eye, a tooth for a tooth" was the first expression of what finally took more general and less material form in the equivalent formula of evil for evil. To this gratuitous and hence, really less moral affirmation, we oppose the necessity for defensive reaction imposed on every living being by the instinct of self-preservation. Certainly the individual could not invoke the plea of self-defense if he killed a man under pretext that he or some one else might attack him at a more or less distant future time; and for the very reason that in real life an individual is not exposed every day to attack. It is, therefore, natural that he should wait before defending himself until the attack actually occurs. And in waiting he may take

[1] *Bagehot*, "Scientific Law of the Development of Nations."

[2] *Stephen*, "General View of the Criminal Law of England" (London, 1863), p. 99.

[3] *Ellero*, "Opuscoli criminale," 132.

[4] *Romagnosi*, "Genesi del diritto penale," § 337.

only indirect preventive precautions as appropriate and effective for the individual and society. Society, on the contrary, as a collective and permanent organism, sustains every day and hour in some part or other of its entirety continual criminal aggressions uninterrupted in the form of murders, robberies, forgeries, rapes, and arsons.[1] It may be said without exaggeration, therefore, that for society aggression is always existent and imminent and that it really has this fundamental condition in legitimate defense of its repressive acts, so that it exercises, in this respect let us again repeat, only a preservative function inherent in every social organism.

§ 224. (B) Objections to Theory of Defensive Penal Justice: Social Protection.

So be it, the classical criminologists reply; but do you not see that in speaking of a social defense more or less impregnated with a spirit of vengeance, you expose individuals to every kind of vexation on the part of society, which in the name of alleged social necessities or utilities exaggerates repression and establishes by the destruction of individual human rights the famous order which "reigned at Warsaw"? On the contrary, they say, we speak of juridical defense or protection and interpose the law's supreme and absolute limit as a solid barrier to all excesses of society against individuals. I fancy that it is unnecessary to call attention to the fact that this generous anxiety of the classical criminologists is due to the individualistic current peculiar to the nineteenth century, which, reaching the point of exaggeration, continues to see in modern society what the State of the Middle Ages was; namely, the enemy of the individual. This apprehension will more and more diminish with the modern equilibrium, which positive sociology proposes to establish between the individual and society, considered as the inseparable and strictly solidary terms of human life. I deem it useless to recall with emphasis the very accurate idea of Livingston saying in his preface to the project for a penal code for Louisiana: "General utility is so intimately connected with justice that they are inseparable in criminal jurisprudence," or, to put it dif-

[1] This disappeared with the equivocation upon which it was founded, the constant objection, "that there can be no self-defense against assault to come, but only in case of actual aggression." *Proal*, "Déterminisme et pénalité," A. P. (July 1, 1890), p. 379. Many others had said it before him, among them *Ortolan*, "Eléments de droit pénal," I, § 180.

ferently, they are one and the same thing. It seems more useful to discuss here an idea elsewhere expressed. It has been accepted by Puglia and the other adepts of the positivist school, thus confirming an observation made by Carrara and repeated by Cisotti: namely, that frequently formulas "dissimilar in terms are found to be one at the root."[1] Indeed, I believe that the formula — "necessity of legal defense" — is really in accord with the facts and supplies the only positive justification of the right to punish; but I also believe that the formula — "necessity of social defense or conservation" — is not only the equivalent of the first but is more exact. The expression "defense by law" conceals an error in that it does not distinguish with precision rational law, the entirety of principles elaborated by thinkers and jurists,— and positive law, which is the social precept, the expression of the will of the legal majority and of general needs. Now, if the words "defense by law" mean that society should strive by punishment to preserve an order, abstract and rationalistic, then it is not the same thing as "social defense," which contemplates the concrete conditions of social existence. Still it is easy to remark that such is not the real reason of the punitive agency: since, while society, in formulating its laws, is bound to follow the injunctions of reason and science; nevertheless, when it has once realized in concrete form a given legal command, it can only assure the preservation of that order as it actually exists without regard to its conformity with scientific principles. As the idea of law is not absolute, eternal, and immutable,[2] but varies with time and place and even with the person, it is evident that the sole starting point for the scientific study of a social function can be found only in positive law as it exists in a given society. Consequently, if it be said that that which gives to society the right to punish is the necessity of the legal system, this can signify but one thing, to wit; that society punishes in order to preserve the legal system existing

[1] *Cisotti*, "Il diritto penale," in "Rivista penale" (1876), p. 283. And yet the contemporaneous Italian classical school, after exhaustingly analyzing crime as an abstract entity, has spent much time and ingenuity in discussing whether the right of punishment is "juridical guardianship" (Carrara), "juridical preservation" (Tolomei), or "juridical reintegration" (Pessina). This Chinese puzzle reached its limit in the Hegelian formula: "Crime is not law" but "Punishment is not crime," therefore, "Punishment is law" because "the negation of a negation is a reaffirmation."

[2] *Spencer*, "Basis of Morality." *Hennebicg*, "Leçon d'ouverture au cours de droit naturel" (Brussels, 1896).

at a given historical moment. But it is then also readily seen that maintenance of the legal system is the exact equivalent of maintenance of society, because society and law are correlative and interchangeable terms. Whoever says law says society, for no law exists without society as no society exists without law. Law, as Ardigo has expressed it (in a singularly happy phrase which has been quoted thousands of times since I first gave it circulation among jurists), law is the specific force of the social organism, as affinity is the specific force of chemical substances, life that of organic substances, and psychiatry that of animal substances.[1] As there is no chemical substance without affinity, organism without life, animal without psychiatry, in like manner there can be no society without law. If a man were alone upon the earth he would encounter no restraint upon his activity. He would meet with obstacles in other animals or in natural forces; but there could not be, and there is not, any juridical rule of conduct between the man and things or other beings because there would be absolute heterogeneity, whether of natural order or animal species. Law is possible only to man, not because he alone is endowed with reason and free will, as asserted by jurists faithful to the traditional philosophy, but only because the species, the race, is the great criterion of social affinity which only between man and man can have a real social, and hence, a legal relation. The soul of law is equality, not only in the moral or ideal sense but also in the physical or organic sense. Indeed, if a civilized man meets a savage of the lowest development, there can be no common rule of law; the enormous organic and psychic difference separating their two races prevents any reciprocal accord on the limits imposed on their coexistence.[2] The inferior races, as Lubbock said, have no idea of law, howsoever familiar and fixed the idea of the law and command of the chief of the tribe may be among them.[3] It is only among men not too dissimilar in race or psychic constitution that a constant rule of conduct can be estab-

[1] *Ardigo*, "La morale dei positivisti," p. 550; *Bardier*, "La vie des Sociétés," p. 25, says with less accuracy, "the social environment is governed by sociability as the chemical environment is governed by affinity."

[2] This observation on even physical equality or similarity as the condition of juridical relations has been reproduced later by Tarde in his eclectic theory of responsibility founded on personal identity and social resemblance. *Giddings*, "The Principles of Sociology" (New York, 1896), believes that the specific characteristic and elementary tie of society are nothing but a "feeling of race."

[3] *Lubbock*, "Origin of Civilization and the Primitive Condition of Man."

lished which will follow in its development and perfection the successive degrees of human and social evolution. Indeed, not to mention the animal societies, even among savages certain rules of collective life are imposed by the primitive conditions of existence and present in embryo the social and legal order that afterwards spreads and become complicated with the development of civilization. We see it passing from a simple and violent resistance by brute force to a rational equilibrium of legal rights.

Hence, from the moment that two men confront each other their external activity encounters limits in their mere coexistence: the same tool cannot be used by both at the same time: the same food cannot be eaten by both.[1] If to these two men we add a third, a fourth, and so on, up from the savage tribe to the modern State, their relations and, hence, the limits of their individual activities, will increasingly multiply and interlace, and the juridical order will become endlessly complicated. It, too, follows the universal law of evolution by a passage from the simple to the complex. But whatever may be the degree of development of the abstract idea of law and the concrete juridical order, the incontestable fact remains that there is no human association possible without a juridical order and without limits to the activity of its members. The experimental and only possible conception of law is the necessary limitation of coexistent activities. Stuart Mill said exactly: "A right is a liberty limited by another liberty," and Stein repeats that the law "is, abstractly speaking, the limit between persons at every particular moment of their actual life." [2] Dante already defined law as "hominis ad hominem realis ac personalis proportio"; while Kant spoke of "an universal coercion that protects the liberty of all." [3] Spencer said, "Rights are a relation of man to man, outside of which the correspondence between internal and external acts, whence life results, is impossible"; and more recently, justice is "the liberty of each limited only by the equal liberty of others." [4]

As may readily be seen, from this negative conception of

[1] *Spencer*, "Justice" (London, 1891), begins his list of human rights with "right to physical safety" (Chap. XI) and "to the usage of natural means" (Chap. XI).

[2] *Stein*, "Die Volkwirthschaftslehre," 2d ed. (Vienna, 1878).

[3] Cited by *Carle*, "La vita del diritto nei suoi rapporti colla vita sociale," p. 307, and 2d ed. (1891).

[4] *Spencer*, "Justice," p. 46 and Ap. A, where he declares that he did not know Kant's definition similar to his own. But Spencer did not recall Stuart Mill's definition of law more similar still.

law as a limitation imposed by the necessities of the association of individual existences, springs the correlative and inseparable term, its positivistic conception as the faculty to do and exact everything that does not exceed on our part the border line which is marked by the coexistence of the others and which serves to restrain others within the same limit with respect to us.[1] Hence it follows that law and duty, instead of being related to each other in an order of precedence and preëminence as the moralists and philosophers of the law have dreamed, are contemporaneous and inseparable like the front and back of the same surface, because they are determined by the inevitable necessities of human coexistence.[2] Law, besides its individual aspect of exterior and mutual limitation among coexistent human activities and of the consequent faculty of acting and exacting up to this limit, should also be considered in its social aspect, which is also double. That is to say, that, inasmuch as the coexistence of two or more men makes a series of negative limitations and positive faculties in their external activity necessary, it is evident that law cannot be conceived of except as a necessary product and a specific force or internal protective function of every social organism.

As in the case of animals, the psyché has its origin and function in the protection of their existence, since, to illustrate, the idiot abandoned to himself perishes from his absolute psychic insufficiency to procure and assure the conditions necessary for existence.[3] So, also, law has its origin and function in the protection of society, which could not exist if, among the component individuals, in their relations with each other and with the collectivity, the sum of negative rules (limits) and positive rules (faculties) that make up the law was lacking. Hence it is that Ardigo's phrase: "Law is the specific force of the social organism," should be supplemented by that of Ihering: "Law is the guarantee of the conditions of existence of society."[4] Hence, too, it is, that law, both as an idea (in philosophical theories

[1] What Sticker (Vienna, 1884) calls the "Physiology of Law" consists in this: It is formed by the realization of the power to act, a feeling which man owes to the power of will over his muscles, and to experience, which teaches him that other men have the same power and hence the same faculty.

[2] *Cf. Kowalevski*, "Les origines du devoir," R. I. S. (February, 1894).

[3] *Sergi*, "Origine e significazione biologica dei fenomeni psichici" (Milan, 1885).

[4] *Ihering*, "Der Zweck im Recht," 2d ed. (Leipsic, 1884).

and in public opinion) and as a fact (in statutes and customs) is neither absolute, eternal, nor immutable. Like language, art, economics, religion and morals, it is a special product which varies with time and place according to the physiological aptitudes of each ethnic group and the conditions of the environment wherein life unfolds. Hence (be it said parenthetically), whereas this positivistic and relative way of considering law has seemed to traditional philosophy to be a real shock tending to suppress every guarantee against the arbitrary action of the State by suppressing the solid preëxisting and higher authority of an eternal archtype of law (and this is why the classical jurists write Law with a capital L as the Platonists wrote Idea with a capital I), it is on the contrary the only way, both scientifically and in fertility of results, of strengthening the legal conscience of individuals and nations in view of the "struggle for law," wherein Ihering rightly saw the first duty of every civilized man.[1] If law is not immutable, but like every other natural and social phenomenon follows the law of evolution, it is evident that just as it differs to-day from the law of the past, so will it in the future be other and better than it now is, because it will be always more humane. Humanity should tirelessly struggle for the development and perfection of law instead of becoming mummified in the formulae of theorists or the codes of legislators.

§ 225. Same Subject: Conditions of Existence.

The other social aspect of law consists in the legal sanction necessarily contained in it which is the only positive criterion (a subject much discussed) of the rules of morality. In every social organism, the natural conditions of existence fix the rules of conduct which tend in part to make the coexistence of the associated individuals possible and satisfactory, and in part to defend the interests of the dominant class. Therefore, it may be said of law viewed under this social aspect that its function is to maintain simultaneously social solidarity, and to provoke inequality. Each of these rules of conduct, as we shall presently see, has its own coercive sanction; that is to say, they determine a corresponding act of society against any individual who infringes them. It is only when a rule of conduct has a considerable importance for the existence of society or a class, that it is accompanied

[1] *Ihering*, "Der Zweck im Recht."

by a coercive sanction, and thus becomes a rule of law and ceases to be a rule of convenience or morals. Hence, every infraction of the rules of law induces a sanction, not merely the reaction of public opinion but the reaction of the State placing its power at the service of a given law, emanating from social authority. The word justice, in its positive sense, expresses the sum and the general idea of those social sanctions which, at every time and place, whether by custom or law, but always with a coercive authority, fix and protect the rules of law determined by the special conditions of social existence. A constant law, however, rules the cycle traversed, from birth to decline, by every law that looks to the defense of a class rather than to that of the collectivity. This law is that at first the needs of existence (individual and social) determine corresponding interests (in the individual or in the collectivity) and the latter lead to a struggle to transform them into rights by assuring them a coercive sanction. Then rights by reason of inevitable abuses and changes of economic and, hence, social conditions, degenerate into privileges; and the latter, with more or less obstinacy and during more or less time, but ultimately in vain, oppose the further social evolution produced by the conquest of new rights corresponding to new needs and interests brought about by the change of social conditions.[1] Direct experience of these legal sanctions afterwards transmitted by heredity gives origin to and develops a "legal conscience" in each individual, just as the experience of the sanctions of public opinion and religion gives birth and development to a "moral conscience," which to speak more exactly should be called "social sense."[2] It is therefore from the theo-

[1] The historical struggle of the middle class ("Tiers État") against the dominant classes of nobles and clergy, determined by new needs and interests consequent upon the birth of manufacturing industries and the discovery of America, then to-day the struggle of the proletariat for its rights, that is to say, for the human right of all members of society, a struggle determined by the new needs and interests consequent upon great capitalistic industries of the middle-class régime, are manifest examples of this change, at first evolutive, then unevolutive, of needs into interests, rights, and privileges.

[2] *D'Aguanno*, "Genesi ed evoluzione del diritto civile" (Turin, 1890), pp. 99 *et seq.*, holds correctly that the juridical conscience is born spontaneously in a people as a sentiment accompanying the reciprocal limitation of coexisting actions. But I believe him wrong in not believing, in accordance with the English view (*Stuart Mill*, "Utilitarianism," Chap. V; *Bain*, "The Emotions and the Will," P. I., Chap. XV; *Spencer*, "Principles of Psychology," pp. 152–155) that juridical sanction is derived from the affirmation of legal regulations by the social power; for this is an undeniable element in the growth of the "consciousness of law." In this way alone, can the growing predominance of the psychological element over and

retical and systematic study of the negative and positive norms of human activity under individual and social aspects that the science of law originates and grows. It is metaphysical or positivistic, depending upon whether it starts with ideal abstractions or observation of facts. And it follows the phases of general philosophy, since, while the latter studies the whole man, the former studies an important part, namely, his social, external, juridical life. In whatsoever way this part of human existence be considered, whether under the individual aspect — as an inevitable limit between two or more coexistent activities and as a corresponding and necessary faculty of doing and exacting everything that lies within this limit — or under the social aspect — as the specific force of every social organism and as a corresponding and necessary collective sanction — at all events it remains established that society and law are convertible and correlative terms. Hence it is exactly the same whether we say legal prohibition or social prohibition, only that the formula which speaks of social prohibition is more accurate since it excludes a possible equivocation with the abstract and absolute law which has nothing in common with the punitive agency considered in its practical exercise as a daily social function.

At first, punishment was to avenge offenses; then it was to appease the outraged divinity and to reëstablish the authority of the prince injured by the offense; then it was believed that the justification of the right to punish lay in a more or less absolute justice or the obligation to correct the criminal, and a moral sacerdotal character was attributed to it; finally, it was considered that its real principle was the necessity of maintaining the legal or social system.

above the physical element of coercion be explained. See *Neukamp*, "Das Zwangsmoment im Recht," in the "Jahrbuch des Internationalen Vereins vergleichender Rechtswissenschaft" (1889), IV, fasc. I. In the eyes of metaphysical philosophy, on the contrary, man is born with a congenital moral sense, thanks to which, prior to and independent of all social experience, he knows what is just and what is unjust according to the eternal and absolute rules of moral law. This statement is partially true. Every man has an hereditary predisposition to feel and conceive of the rules of morals and law, through the experience of past generations, which facilitate his being taught from infancy. But the hypothetical existence of absolute and eternal norms of morals and law must be looked upon as chimerical and untrue. Science renounced them forever after Locke's triumphant criticism of innate ideas. As Pascal said, a meridian is enough to reverse all rules of justice. Patricide is the most horrible injustice in Europe, while in Sumatra it is a sacred duty. See for a criticism of innatism *Laviosa*, "La filosofia scientifica del diritto in Inghilterra" (Turin, 1897), V. I, pp. 313 *et seq.*

In any event, whatever be the reasons and the purpose invoked by thinkers, society has always exercised the penal or repressive agency: and that signifies that it is an essential condition of the existence of society.[1] It is, after all, only an effect of the universal law of conservation. It is, consequently, a function, which, gradually eliminating the spirit of vengeance, penance, and retributive justice, should now be reduced to its real character of a preservative clinic against the disease of criminality.

§ 226. (C) Objections to Theory of Defensive Law: Influence of the Dominant Class.

The last objection to the idea that the maintenance of society is the reason for the penal function is as follows: It is asserted that the office of penal laws has not hitherto been to defend society, that is to say, all the groups that compose it, but to protect peculiarly the interests of those in whose favor the political power is constituted, namely, the minority.[2] In this connection I have always said that "defense of society" is equivalent to the defense of the concrete juridical order. While it is undeniable that in this concrete order, at each historical epoch the interests of the dominant classes prevail, it is also indisputable that civilization evolves in the direction of gradually effacing and attenuating in social law the most clean-cut inequalities between the dominant and the subject classes. There was first a struggle, and a victorious struggle, to abolish civil inequality (masters and slaves), then religious

[1] *Carrara*, "Programma," § 612, wrote, "It is not society which gives rise to the right to punish, but the necessity of punishing the violators of rights, which makes civil society." Without considering this as a return to the theory of social contract, it is strange to imagine (I), "that law existed before civil society," for if there were no society, where and how would law be clothed? In "mente Dei," perhaps, but not among men. (II), That civil society was formed to punish wrongdoers. Civil society was formed in the first place, because man, like every other animal, cannot live in isolation; but besides, for other reasons and objects more noble and fertile than that of punishing wrongdoers, as if it were only "a mental insurance company against crime." This confirmed me in my opinion that if Carrara was a theoretical and practical anatomist of crime, as juridical entities, he was not as great a jurist, psychologist, and sociologist.

[2] *Vaccaro*, "Genesi e funzione delle leggi penali," p. 101; *Loria*, "I basi economiche della costituzione sociale"; *Stein*, "Die Gesellschaftslehre," pp. 56–73; "Gegenwart und Zukunft der Rechts- und Staatswissenschaft," II, 4, III; *Ihering*, "Der Zweck im Recht," Chap. 8, § 2; *Gumplowicz*, "Grundriss der Sociologie" (Vienna, 1885), pp. 189 *et seq.*, where he said, "the true principle, the life of all law, is inequality."

inequality (orthodox and heretic), then political inequality (struggle of the third estate, or bourgeoisie, against the aristocracy and clergy), and now there is the struggle to abolish economic inequality (proletariat and bourgeoisie) as I have elsewhere very fully explained.[1] Therefore, this objection has nothing conclusive against the solution given by the positive school for the problem of responsibility and penal justice. While this objection has no value to impair the scope and basis of our theory that the defense and preservation of society is the sole positive reason for penal justice, it serves, however, to make precise its limit and tendencies when one combines the idea of defense of society with the idea of defense of class, as I have recently done.

§ 227. Scientific Socialism.

When the positivists, having insisted from the beginning, as was necessary, on the constitution and importance of the anthropological factor in the natural genesis of crime, had turned their attention to the social influences which act upon criminality and their relations with penal justice,[2] there happened in Italy and in other countries, politico-social events (anarchistic attempts, the Panama scandals and their relative impunity, popular movements in Sicily and Lunigiane and their repression by martial law and military tribunals, occurrences repeated in 1898) which placed the most secret ravages of the penal mechanism under a magnifying glass.[3] Then it was that, having devoted myself after the third Italian edition of the present work (1892) to the study of the Marxian theory as a sociological doctrine, on the one hand, I reached the conclusion that scientific socialism is the logical and inevitable conclusion of sociology, which otherwise must remain sterile and impotent.[4] On the other hand, I came to distinguish in criminality two great categories of facts dif-

[1] *Ferri*, "Socialismo e scienza positiva," 2d ed. (Palermo, 1900).

[2] This is what I have always done from the beginning, with the classification of anthropological, physical, and social factors of criminality, and then with the bio-sociological classification of criminals.

[3] In sociology, there are always illuminating facts, which lay bare the faults and spirit of institutions. Thus the Dreyfus trial illuminated, like a searchlight, the faults and spirit of military justice (the slave of militarism, the ally of clericalism) in opposition to civil justice as shown by the same case in the Court of Cassation. The abuses and judicial errors of military justice were and are a daily phenomenon, but the outcry caused by the Dreyfus case was necessary to obtain evidence.

[4] *Ferri*, "Socialismo e scienza positiva."

ferent in their character, motives, and consequences, and to distinguish two motives in the penal function more or less in antagonism, and one or the other more or less dominant according to the different forms of criminality to be repressed.[1]

§ 228. Two Forms of Criminality.

There exists an atavistic and an evolutive criminality. The first is the common criminality such as is shown in the muscular and atavistic form, strictly speaking, or the spurious form, a form modern and modified by evolution. The second is the politico-social criminality which, under one or the other of the two forms, tends (in a more or less illusory way) to hasten the future phases of politico-social life.[2] Thus the distinction between atavistic and evolutive criminality, which has above all a psychologico-social base (in the sense of its determinant motives), is more complicated in real life, either in form of execution which may be atavistic in evolutive criminality and vice versa, or in the anthropological category of the criminals. Indeed, criminality in the most characteristic form (muscular) will be found generally among born, habitual, or insane criminals: and when it is present in occasional criminals or criminals by passion, it will, as a rule, take on the less serious forms of violence and fraud. And with greater certainty, evolutive criminality will be, for the most part, the work of pseudo-criminals, or normal men (for the forms of pure politico-social heterodoxy), or of criminals by passion (through fanaticism like Orsini and Caserio), or of occasional (chance) criminals (especially in collective crimes and crimes of mobs); although it, too, may by way of exception be the work of born-criminals (as for example, Ravachol), or of insane criminals (Passanante).[3]

[1] *Ferri*, "Delinquenti ed onesti," S. P. (June, 1896); "Temperamento e criminalità" (a report to the criminal anthropological congress at Geneva), A. C. A. C. (Geneva, 1897), p. 86, and in the "Scuola positiva" (August, 1896); "La justice pénale," résumé of the course in criminal sociology at Brussels (1898). On this résumé, see *Cruppi*, "Les idées de M. E. Ferri sur la justice pénale," in the "Revue bleue" (3 December, 1898); *Richard*, in the "Année sociologique" (Paris, 1898), I, p. 455 (1899), II, p. 413; in the "Revue philosophique" (December, 1898); *DeQuiros*, in the "Rivista generale di legislacione y jurisprudenza" (January, 1899).

[2] The terms atavic and evolutive criminality are not used in the sense of violent and material and fraudulent and intellectual given them by Sighele and Ferrero, who were the first to use them.

[3] From this point of view, brigandage is one of the most characteristic phenomena. It can be evolutive (with motives either political or of social protestation as in the case of Karl Moor, described in "Die Räuber," by *Schiller*) or atavic (determined by vengeance, ferocity, or cupidity). It may take light forms of vio-

The practical problems of the measures to be taken against the authors of a given crime can only be solved by the simultaneous application of various bio-social criteria, as we shall see later, that is to say, criteria of the conditions of the act, the agent, and society, according to the right invaded, and determining motives, and the anthropological category of the criminal.

§ 229. Distinction Between Two Forms of Criminality.

In the meantime, in regard to the present question, the conclusion is that in all these criminal phenomena there is always a material menace or an effective violation of the actual conditions of existence of the individual (in his bio-personality) or of society (in its concrete historical composition). But that which essentially separates the former from the latter, aside from the different morphology of violence or of fraud, is in the motives controlling the author of the deed, whether of selfish and anti-social interests or of altruistic and social interest, whence it follows that it is an universal interest to be defended against atavistic criminality, while in evolutive criminality the interest is restricted to the minority of the dominant classes.

To this distinction between atavistic or anti-human and evolutive or (strictly) anti-social criminality there is the corresponding distinction between defense of society and defense of class which may degenerate into class tyranny.[1] The ideas of "defense of society" and "defense of class" are each incomplete. The synthesis that consolidates them is that the penal function whereby the State holds the individual responsible for crime committed by him is the expression and effect of a twofold natural necessity: on the one hand to preserve the whole collectivity from anti-human forms of criminality and on the other hand to defend a part of the collectivity, the dominant class. This preservation and this defense will prevail differently according as the criminality may be atavistic or

lence or abuse (threatening letters or personal restraint) or consist in atrocities (of cruelty, cannibalism, etc.). It is found in occasional criminals and those of passion (who become bandits after a murder caused by jealousy and spite) as well as in habitual and congenital criminals. This explains the fascination exercised by brigand-chiefs.

[1] Many ties between civil law and the dominant class can be given, about which so much has been written. *Menger*, "Le droit civil et le prolétariat" (1889). *Spencer* recognized this, "History has shown in an irrefutable manner that those who have the power use it to their own advantage." "Justice," § 106.

evolutive; in the first case attacking the inherent conditions of human existence, and in the second, the politico-social order, which is always historically transitory.[1] This synthesis clearly distinguishes the part in penal justice which concerns the transitory interests of the dominant class and the part which touches the imprescriptible necessities of individual and social defense against the disease of criminality, which is analogous to the other diseases threatening human existence. Furthermore, by virtue of this synthesis the positivist criminal school is entitled to give a wider, more complete, and more efficacious meaning to the formula of social defense. In the actual state of society, defense of society should be understood to mean not only the protection of the whole collectivity against the attacks of atavistic criminality but also the defense of the dominant class against the assaults of evolutive criminality, while the State should be defended against evolutive criminality differently than against atavistic criminality.[2] But in the future of "penal justice," on the contrary, science must indicate and impose an ever-growing and ultimately exclusive predominance of the permanent and common interests of the entire collectivity, if not altogether eliminating, at least reducing to the minimum the part which concerns class interests and privileges, thus changing penal justice from a mechanism of political domination into a preservative social clinic.[3] And, to make use of the former words in the new meaning that they contain, the theory which regards social defense as the basis of the punitive function still corresponds, thanks to the above-mentioned synthesis, to the positive and actual conditions of contemporaneous society: but it

[1] This Marxist doctrine on the interest and privilege of the dominant class explains the reasons and excesses in the repression of political and social crimes as the misoneistic theory of Lombroso shows the social and personal growth of political crime. Each is completed by the other, and both theories together give a true representation of the fact.

[2] Then, on the other hand, personal or collective egotism, doubled by fear often simulated but largely sincere, is frequently the cause of excesses in defensive reaction. So we see that evolutive criminality is often, not only in exceptional laws but in ordinary statutes, punished more severely than atavism.

[3] An analogous solution must be given to the social function of religion. *Kidd*, in "Social Evolution" (London, 1895), openly states that the duty of religion is to moderate and repress individual activities in conflict with social interests (those of the dominant class). *Loria*, among others replied, "La théorie sociologique de M. Kidd," R. I. S. (July, 1899), that not only is religion thus demoted into an ally of the policeman (that is to say of the district-attorney, in that it protects the interests of the ruling class) but such a theory makes it disappear when a more advanced economy will have done away with class antagonism.

nevertheless remains the object and criterion of future modifications, inevitable, and already on foot, which are changing penal justice by making it conform to the data supplied by anthropology and sociology on the causes and, hence, on the remedies against criminality.

CHAPTER IV

PRESENT FORMS OF DEFENSIVE REACTION

Theory of natural sanction. Physical, biological, social. Man is responsible for his acts, because he lives in society.

§ 230. Punishment not Based on Moral Responsibility.

The refutation of these objections facilitates the establishment and definition of the first and less heterodox part of our general conclusion; viz.: that the punitive agency is a pure and simple function of the defense of society. There remains the second part, which belongs properly to the positivist school, viz.: the complete withdrawal from the punitive agency of every criterion of responsibility or moral culpability and substituting a more positive criterion which at all events cannot be contested solely on account of differences of religious or philosophical beliefs or mental habits.

This part, peculiar to the positivist school and outlined in my essay "sul diritto di punire come funzione sociale," is to-day accepted by other positivists and by some eclectics. It has since acquired citizenship in the scientific world and retains its essential lines intact. Yet to anticipate verbal misapprehensions whereon certain opponents base all their criticisms,[1] it is well first of all to give precision to the terms of the problem and especially to these terms, viz.: imputability, culpability, responsibility, punishability, and the like. The two extreme opposite points of the question are: an offense by an individual and a punishment provided by the law-giver and applied by a judge. The whole problem consists in determining the conditions by which these two points can be brought together.

§ 231. Punishment Requires Physical Imputability.

The first obvious condition is that the delict shall have been committed by the man placed on trial. In other words, there is first of all necessary physical imputability which makes it possi-

[1] "Actes du 2ème Congrès" (Paris, 1890), p. 360.

ble to impute materially any given physical or muscular act to the man who has committed it because there is always something of this nature even in what is called moral participation of an accomplice, such as the instigator of the crime or he who has ordered it. The act must be his. And hence it is that the essential and fundamental point of first condition in the practical administration of criminal law is material evidence, direct or indirect, establishing, first, that the crime has been committed; second, that it has been committed by the person on trial, and hence, that it is his act. To meet this second requirement, it is further necessary, apart from the fact that it was materially executed by him, that there was present in him the last phase (external or muscular) of a physio-psychological process psychically free, such as I have sketched above in the discussion of free choice. One who under coercion of another commits or omits an act that he should not or should have performed is but an instrument. The real author is he who coerced him to commit or omit it: as Wallaston says: "He does not act but is acted upon." Consequently, in such cases the materially coerced doer of a wrongful act is neither responsible nor punishable, not because he did not "freely will it" nor even because he has not "willed" it at all (as I will say presently in connection with the eclectic theory on what is "voluntary"), but solely because he is not the author, and hence the crime is not his crime and is not the index and effect of his personality and his personal manner of reacting against environment.

§ 232. Legal Responsibility.

Assuming that it has been established that the crime has really been committed by the accused, that there was present his personal and physically-free mode of reaction against the external environment, that is, assuming physical imputability, does this connection of physio-psychological causality between the act and the agent suffice to make him punishable? Does it cause political imputability or punishability or moral responsibility, for these words are synonymous? That is the whole question. The classical school has always maintained, and still maintains, that to identify political imputability or penal responsibility with physical imputability there must further intervene, as an intermediate term or essential condition, moral imputability, or responsibility, or culpability, all of which are the same thing. This moral responsibility is

based on two conditions: free will and normal intelligence (or conscience) in the author of the crime. The positivist school, on the contrary, maintains that as there is no free choice or free will, neither is there responsibility, culpability, or moral imputability: and this does not involve as a consequence that there should also disappear all political imputability or penal accountability of the wrongdoer. It maintains quite the reverse (and this is its radical innovation), that physical imputability of crime is sufficient to constitute penal accountability, it being naturally at liberty to seek other objective and subjective conditions to adapt the practical forms of penalty or defense of society, to the different categories of criminals and of crimes, as I shall explain.

§ 233. Objection that New Penology is Not Based on Right.

Certain eclectic theories were suggested midway between these two views, after the second edition of this work. I shall not touch on them till later. The eclectic theories all agree in considering the condition of moral responsibility necessary in order that punishability should be identified with physical imputability, and punishment with crime, while they vary the criteria of this moral responsibility, considered as so indispensable and which they undertake to establish outside of the criterion of an "absolute free choice," whereon the pure classical doctrine rests. Whatever theory be accepted, these words — imputability and responsibility — are equivalent and change their meaning only with the adjective qualifying them, becoming physical, moral, or penal responsibility and imputability as they may be used.[1] This second part of the problem, the independence of penal accountability from moral responsibility, was first outlined by me in the essay "sur le droit de punir comme fonction sociale" and later developed in the second edition of this book in response not only to the flattering solicitations of a kindly critic,[2] but also in reply to another oft-repeated objection made by persons not very familiar with the new order of ideas introduced by modern sociology. They claim that the penal agency should be reduced to a mere "defensive mechanism" devoid of any higher norm of right and "should sanction the prohibition of harmless acts under pretext

[1] The phrases juridical or legal responsibility are more generally used when the social reaction against individual action does not entail restraint but only legal, civil, political, or administrative disability.

[2] *Paulham*, "Analyse des Nuovi Orizzonti," R. P. (November, 1881), p. 533.

of public utility in conceding to social authority the tyranny of arbitrary power."[1] "The innocent and the guilty might be stricken indifferently if the death of the former should be considered as useful as that of the latter."[2] This objection is refuted by both history and logic. It is refuted by history, for in the words of Girardin:[3] "What is history if not the bloody martyrdom of a numberless multitude of victims immolated by ignorance, superstition, and cruelty, armed with the right to punish," even when jurists spoke, as they still speak, of justice and the divine mission, or even the supreme and absolute norms of law? It is refuted by logic, because (aside from the fact that such an objection has the serious defect of proving too much) when science has given its rules (according to our opponents, rules of eternal and absolute justice; according to us, rules of social and relative justice) its task is complete. Either social power, the executive organ of the social function, follows the rules of science and then the "arbitrary" disappears; or it does not follow them, and then we say that the abuse of a principle never proves its falsity. Science has only to take cognizance of such abuse in order to end it, or at least by pointing out its existence, to facilitate the struggle for better law from which every social and legal reform is born.

§ 234. Positivistic Basis of Penal Law.

These are the rules of legal and social life in all that concerns the preservation of order, which the positivist school strives to establish in extracting them, no longer from subjective and "a priori" principles but from the daily observation of facts. We have expounded above this observation of facts in reference to the succession in time, in studying the natural evolution of the defensive reaction against acts harmful to the individual or society; we must now complete it in relation to present existence in actual society by studying some facts so common and characteristic that they have hitherto been neglected by criminologists. From the planetary equilibrium to the crystallization of minerals, from the first beginning of organized and living matter to the individual existence of animals and man, from the social relations of a zoöphyte with its colony to those of man with the society of which he is part, life is always and everywhere an incessant, inexorable

[1] *Carrara*, "Programma" P. gen., last edition (1886), I, 42.
[2] *Franck*, "Philosophie du droit pénal" (Paris, 1880), p. 18.
[3] *Girardin*, "Du droit de punir," pp. 33, 174.

succession of actions and reactions. Even restricting it to living beings, especially animals and man, the concept of sanction rules, which is equivalent to that of reaction. Since man is at the last stages of the grand pageant of life, he is primarily subject to the same sanctions as the inferior orders in nature, sanctions common to him and every other portion of matter. Then he passes under the sanctions of a higher order which is not peculiar to him exclusively, but is shared by the higher animals, although only in him is it found in the much higher and more complicated degree viz.: the social order. Precisely because there is a distinction in nature between physical and biological and social orders, there are also three great classes of reactions or corresponding sanctions, — physical, biological, social.[1]

§ 235. Physical, Biological, and Social Sanctions.

The man or animal that, even unconsciously, involuntarily, or by constraint, violates the laws of nature, finds in nature itself an irresistible reaction or sanction. He who leans too far out of a window, even with the most moral or benevolent intention, falls. This is the physical sanction. Whoever eats too much, gets indigestion, becomes ill and suffers; whoever abuses his organism, whether in its physiological or psychological functions, flies in the face of a multitude of suffering, and often ruins his physiological or intellectual health. This is the biological sanction. A passer-by who in his absentmindedness and without intent to injure, jostles another, evokes in the latter a reaction either in words or acts. If he protests that he had no wrong intentions, the reaction is less lively, but not absent; a less favorable opinion of him will remain; so that if his distractions are habitual the opinion will spread and there will grow up about him an isolating atmosphere, causing him continual humiliation,

[1] *Guyau*, "Critique de l'idée de sanction," R. P. (March, 1883); "Esquisse d'une morale sans obligation ni sanction" (Paris, 1885), Bk. III, distinguishes the following kinds of punishment viz.: natural, moral, social, internal, religious sanctions, and those of love and fraternal feeling, and he reaches this easy conclusion that "punishment becomes an entirely human idea." He adds, however, that sanctions must cease to be chastisement for evil done to become loving rewards for good. It must change its quality of punishability to amiability. This latter idea, which is also that of Fouillée, seems incomplete, because either it is relative and means that fraternal coöperation accompanies repression from the very beginning to the development of civilized life, in which case the theory is excellent but a little too new; or else it is absolute, and then it presupposes the disappearance of evil from the human world.

not to mention damages to which he may be submitted. The same is true of him who is slanderous, ignorant, proud, or avaricious. A merchant who not by his own bad faith but through the abuse of his confidence by others suffers reverses and becomes bankrupt, a man who with honest initiative strives to open up a new source of wealth but fails, falls into misery and neglect. He who in good faith executes an act contrary to law sees this act annulled and must, to his prejudice, submit to all of the consequences of such nullity. He who causes an unintentional injury to another even without personal participation, as by the act of his son, servant, or animal, is required to pay the damage. A poor madman who attacks a passer-by, it may be with the insane idea of doing good, is wounded, perhaps killed. His mere inoffensive but noisy appearance on the streets is ground enough to deprive him of his liberty and lock him up in an asylum. A cabman who without malice or intent injures or kills a pedestrian is sentenced to an imprisonment which may cause his material and moral ruin.

§ 236. Kinds of Social Sanctions: Coercive.

These are so many forms of social sanction: examples of them could be multiplied, and they can be grouped in the following genera of social (coercive) sanctions: public opinion — economic consequences — nullity of acts performed — reparation in damages — violence inflicted (either by self-defense or administrative measure). The positivist reason for these sanctions, varying in form and intensity with the different acts which induce them, consists, as Holmes observes, in this, that "men live in society and this makes necessary a certain average conduct, a sacrifice of peculiarities exceeding a given limit. If a man be born irrascible and awkward and continual accidents befall him as a consequence so that he suffers and causes his neighbor to suffer, his innate defects will find excuse before the celestial tribunal, but here below his blunders are no less disagreeable to his fellows than if they were intentional or negligent misdeeds. They are, therefore, right in demanding that at his own risk and peril he place himself on their level and the courts established by them are right in not taking into account his personal peculiarities." [1]

[1] *Holmes*, "The Common Law."

§ 237. The Essential Quality Common to All Forms of Social Sanction.

Now, what is common, and therefore constant and essential, to all these infinitely varied forms of reaction and social sanction for them to appear in the domain of customs and conventionalities and have a social sanction is this simple but very important fact, that the sanction itself is always independent of the will and moral culpability of the individual. This mark, it should be observed, is also perfectly common and constant in the other categories of natural sanctions, the physical and biological.

§ 238. The Essential Quality Common to All Forms of Remunerative Social Sanction.

When we proceed from the forms of coercive sanction to the forms of remunerative sanction (for these will not cease to grow in importance in the social life of the future, in proportion as the present fetishism of punishment becomes weaker, a fetishism in the family, in the schools, and in society that thinks only of repression in directing the conduct of men), we see the objective autonomy of sanction in existence equally for good acts, namely, acts useful to the community which give place to the different forms of remunerative sanction. For recompenses, the social reaction is again always independent of the will or effort of the individual: the opera singer with a golden voice, the poet with facile inspiration, the man with a charming appearance, are courted and caressed, although they have done nothing to obtain their gifts. Even in the case of tireless study and more or less apparent sacrifices, it is always through the natural disposition of the individual in the given conditions of environment (likewise independent of his will) that a man can achieve a high position in society and enjoy the advantages of remunerative sanctions. If success depended only on our free choice, all but idiots would become eminent. But such is not the case, because "to will is to be able" is only true where one is able to will.

§ 239. Social Sanction and Crime.

Thus, departed from the mere reaction of public opinion and arrived at the case of penal condemnation, we are not yet on the real ground of the right to punish, on the ground of criminality or real evil acts. We have remained either in the extra-legal field of public opinion or in the legal realm of civil or adminis-

trative law or of law which is not properly penal. We have, therefore, before us the vast field of crimes properly so called and of the really penal sanctions which belong to them.

The man who steals with or without violence for his own illegitimate gain, who kills to satisfy a premeditated revenge, or ravishes from brutal licentiousness; the merchant who plans his bankruptcy, the slanderer who wishes to ruin his victim, and the like, bring down on themselves (when it does reach them) a rigorous social sanction under the forms of real penalties in the proper sense of the word. This is justice.

The fact of an inevitable social sanction is not concerned of itself either in these crimes or in those we have heretofore mentioned. The object of the discussion is to find out whether this social sanction does or does not depend upon the condition of "free will" and, hence, of "moral culpability" as is maintained by the classical criminal science and by penal legislation. This is exactly what the positivist school disputes and denies.

For what reason should society, which reacts severely in all the other numberless cases of anti-social action without examining them for elements of free will and moral fault, demand this element as a condition "sine qua non" of defensive reaction when there is question of other acts at least as anti-social? Putting aside for a moment the preconceived ideas, the mental and sentimental habits of the past, one can see at a glance that this reaction or social sanction against acts compromising the condition of human existence is natural and hence is as necessary and inevitable in the physical, and biological, as in the social order. If we complete the series of different kinds of social sanctions in the extra-legal, in the civil and administrative, and in the really criminal domains, beginning with the lowest step of the ladder, that is to say from the simple sanction of public disapprobation, to the highest penal condemnation for an actual crime—it is readily seen that the traditional theory of moral fault as a condition of punishability simply makes penalty in the strict sense a gratuitous exception in the whole series of natural and social sanctions, since only in the penal form of social sanction does it introduce the element of "moral culpability," entirely unknown and neglected in every other kind of sanction. Consequently, the positivist theory, requiring this element no more in the social than in other sanctions, has this great advantage, which is further evidence of its truth, namely, that (in perfect conformity with uni-

versal determinism — telluric, organic, and social) the penal sanction is connected with the whole series of natural (physical, biological, and social) sanctions and is thus subjected to the domination of the same natural laws and receives a much more solid foundation than the enigmatical and warmly-disputed "moral liberty." [1] The mere entertaining of such an idea — that penal responsibility in the deliquent should be independent of his moral liberty or culpability — is too direct a shock, however, to the ordinary habits of thought and sentiment not to arouse lively opposition and chances of inducing scientific and social upheavals. Still, since this idea is deduced, in the field of anthropology, from positivist observation of unvarying daily facts; since it is interwoven, in the field of sociology, with the whole order of natural and human life, it seems that it should be henceforth received by unprejudiced minds. It is certain that it will ultimately prevail, triumphing over all opposition through the irresistible force of everyday reality.

§ 240. Moral Culpability must be Discarded as a Prerequisite in Crime.

Why should it not conquer? In spite of appearances it is so slightly revolutionary that it was recognized in primitive legislations not yet dominated by the religious spirit and ideas of social ethics.[2] Moreover, it is more or less openly accepted to-day in our penal and civil codes. When the penal codes punish with

[1] It must be remarked with *Izoulet*, "La cité moderne" (Paris, 1894), Bk. III, Chap. VII, that the different forms of sanction are coexistent and often inseparable. Thus, every crime has sanctions of a physical, biological, and social order. It may meet both a remunerative and coercive sanction. *Durkheim*, "Division du travail social," and "Règles de la méthode sociologique," accepting and developing this naturalistic conception of sanction, believes that the specific quality of social facts is constraint under one form or another. See also *Dorado*, "Problemas juridicos contemporáneos" (Madrid, 1897), p. 1.

[2] "In barbarian legislation, the importance of interest (that is, of the evil will) was long disregarded, while to-day even our criminal laws make it of so great an account, that many cultured men, as Bain says, look upon mistakes of intelligence as a moral stain." *Lubbock*, "Origin of Civilisation and the Primitive Conditions of Man"; *Ihering*, describing the evolution of the idea of responsibility in Roman law, says that primitive law had an objective base in the anti-juridical act, and was not influenced by the fault of the ill doer. "Das Schuldmoment im römischen Recht" (Giessen, 1876). This is the reason, as I have said, that the subjective criterion of will has been added to the early objective one of damages (and of the fear which inspires the wrongdoer, as *Kraepelin* wrote in "La colpa e la pena," in the "Riv. di filos. scient.," II, 524, and 529, because of the religious and moral spirit). This subjective criterion we do not accept in the sense of moral freedom or fault in the agent, but as his personal character apart from the objective qualities of the act and the accompanying social conditions. Chap. VII, *post*.

imprisonment and other penalties involuntary homicide and assaults, their sanction is clearly founded on an idea different from that of an intentional element and moral responsibility. In like manner, the civil codes which declare a man responsible and hence liable in damages for injury caused another, not only where the act is performed by himself, but is due to negligence or want of care of other persons, but even where it is the act of an animal belonging to him, "whether the animal is in his custody or has strayed or escaped";[1] these codes are clearly based upon an idea which is not that of moral responsibility.[2] It is on this account that a classical criminologist has said that in punishing unpremeditated crimes "society debates between the necessity of avoiding the material evil which it sustains and the principles of justice which forbid the punishment of one who has not had the slightest intention of disobeying its laws. If it prefers impunity, it leaves a social evil unremedied; if it strikes the agent, it chastizes a citizen who is morally innocent."[3] From this it may be seen that until now the classical criminologists have formed a doubly defective idea of the problem of responsibility, because, on the one hand, they have considered only civilized humanity already dominated by ideas of religious ethics and still impregnated with surviving idealism; and, on the other they have confined their thinking within the juridico-criminal field. We, however, have a larger idea of the problem and one more conformable to reality, since, not content with the study of human and civilized societies, we go deeper under the twofold relation of succession and coexistence, into the study of the natural evolution of the problem, up from animal societies, through savage tribes, to ourselves. We study its present conditions (the evolutionary product), not solely in their juridico-legal aspect but in all the different forms of individual activity and the corresponding reaction of social sanction. Therefore, in order to eliminate from the punishability of the criminal the uncertain and disputed base of moral responsibility and to substitute for it a really positivistic base safe from all theological or philosophical discussion, we will sum up our researches as follows:

[1] See Italian Civil Code, Art. 1152 *et seq.*

[2] See also the Austrian Civil Code § 1310, which gives the judge power to impose damages regardless of the actual or virtual responsibility of the defendant.

[3] *Ferrao*, "Direito penal portuguez," VII, 126. See also, *Angiolius*, "Il tentative nei delitti colposi"; "Colpa, risarcimento e pena," S. P. (October, 1897, August, 1899), and "Delitti colposi" (Turin, 1900).

§ 241. Social Selection.

Society is a natural living organism [1] and as every animal body lives by a continual process of assimilation and disassimilation tending to the well-being of the individual, the very first

[1] *Gabba*, "Intorno al alcuni pur generali problemi della scienza sociale," II Series, § IV, denied this conception of society, which makes it an organism, saying that it is only metaphoric. After this, many other partisans of the old ideas, or eclectics wavering between the old and the new, have repeated this refrain, that sociology abuses "metaphoric" similarities of the animal and social organism, and that, apart from these metaphors, there is little in it. But, what is science but a series of metaphorical and superficial similarities? To know a fact is simply to compare it with others, noting its similarities and differences. And since man can know only the appearance, surface, the phenomena of things, without ever grasping the substance, essence, or noumena, it follows that all scientific similarities must be metaphorical and superficial. It is only in departing, whether they know it or not, from the old idea, that man can know the essence of things, that these barren disparagers of sociology can imagine that they know its solidity when they make a reproach of an existing fact. But this is a fact, which answers every paradox; from the day when the "abuse of metaphors" was held up against social sciences, they have seen their horizons increase and illumine in an unhoped-for manner. The best sign of movement is to move. More recently still, the organic conception of society has met more active and more concentrated opposition at the hands of sociologists, who (as Novicon rightly said) are forced to accept or oppose the organic conception of society rather for extrinsic considerations than intrinsic reasons. Thus, for example, Spencer, who was among the first to advance and uphold the conception of a social organism, pointed out the difference between animal and social organism, because his individualism prevented him from making the parts (individuals) subordinate to the whole (society). So many oppose the conception of a society organism, because they fear socialistic results, for in the social body, as in the animal body, labor and nutrition should be equally distributed among all the elements (cells and individuals) which compose it, and that there should not by any hypertrophied (by wealth) or atrophied (by poverty) cells. Others, on the contrary, oppose this conception for a different reason; they believe that the conception of a society organism leads to the conclusion that as the organs in the animal body are subject to the "despotism" of the brain, so in society, the individual must be subject to the government or State. Others, finally, oppose this conception because it relegates religious or psychological facts to a second place, and this is contrary to a hidden spiritualism in their doctrine of positivist appearances. Not being able to discuss here the arguments for and against the organic conception of society, I will simply repeat that if some (for example, *Schaeffle*, "Bau und Struktur des socialen Körpers") have exaggerated the analogies between the structure of the animal and social bodies (comparing the telegraph wires to nerves), on the other hand, the fundamental conception of society as a natural organism is positive and undeniable, in the sense that human society (like animal societies) is a natural formation and not the voluntary product of human psychology. Consequently, social phenomena are natural, that is to say, necessarily determined by the physio-chemical conditions of the telluric environment, combined with the physio-psychic conditions of the individual organisms, resulting in the formation of a social environment. And yet it must never be forgotten that all these physical, biological, psychological, and social conditions have a reciprocal reaction.

condition of its existence, so likewise human society can neither exist nor prosper without the ceaseless labor of natural assimilation (births) or artificial assimilation (immigration) and of equally natural disassimilation (deaths) or necessarily artificial disassimilation (emigration and segregation of anti-social individuals, incapable of assimilation because of contagious disease, insanity, and crime). Thus this function of social preservation against criminality comes into its place among the forms of social selection that have had and still have so large a part in the evolution of humanity. It is in this very connection that there have been selectionist excesses in the relations between natural Darwinism and social Darwinism, as when Garofalo demands that born criminals be put to death. Yet penal justice is not merely a function of selection — it is or should be more a function of the preservative clinic. Again, the purely selectionist (Darwinism) point of view must be supplemented, in the social as in the biological order, by the (Lamarckian) notion of adaptation to environment; so that in the pathogenesis of crime the influence of the social environment must be of great weight, whether we consider the social sanction against crime or the readaptation of the criminal to social life, as we shall see in the following pages. At all events, a place must be made in the preservative clinic of crime, as in the clinics of ordinary diseases and insanity, for the social elimination of those who are least adapted to life. The fundamental problem of humanity and the condition of all progress has been the adaptation of the individual to permanent life with other individuals, by an uninterrupted discipline, often of prolonged brutality and bloodshed, through a long chain of centuries.[1] The separation of criminals as a beneficent means of social selection will find its normal, useful application only in a social organization which, in eliminating all forms of degeneracy, will really assure the survival of the best, whereas to-day we have but the survival of those who either as oppressors or as the oppressed are best adapted to the present social environment. Be this as it may, penal justice, first deprived of any other character than that of a function of social preservation, must view crime as the effect of individual anomalies and as a symptom of social pathology necessarily postulating the removal of anti-social individuals

[1] *Bagehot*, "Physics and Politics" (London, 1872); *Starcke*, "Les lois de l'évolution politique," A. J. J. S. (Paris, 1898), IV, 541; *Vaccaro*, "Le basi del diritto e dello stato" (Turin, 1893).

by isolating the infectious elements and disinfecting the environment in which the germs develop. Again, the existence of every animal is the resultant of an internal or biological life and an external relative or sociological life which cross each other and which becomes more complex as the animal approaches the higher stages of the zoölogical scale. In man, as yet the last and most perfect stage of that scale, the relative life has an extraordinary development in comparison with what is seen among the lower species. It grows more and becomes ever increasingly complicated as man passes from the savage state to a more and more advanced civilization, since the origin of any individual act, physiological or psychic, is always found not solely in the personality of the agent but also and particularly (on account of actual hereditary influence) in the collectivity to which he belongs.[1] This social life is nothing but a sequence of action and reaction, indefinite in time and space, but without which it cannot exist. From this it follows that just as every individual act, however indifferent it may seem, determines an infinity of movements in the physical environments, so in like manner it also always determines in the social body a reaction corresponding to it in quality and quantity, either by other individuals taken separately or by the whole society or its representatives.

§ 242. Moral Culpability an Impossible Basis for Defense of Society.

Whatever name be given to the different social reactions responsive to each individual act, both in the case of an indemnity demanded for the damage caused or a penal fine, and in the case of forced detention in an insane asylum or confinement in prison, the idea that society punishes a moral fault to avenge itself or to give reparation to the right invaded or to exercise an act of retributive justice must be excluded. It merely performs a function of defense, or preservation, wherein no resentment or intention of revenge against the criminal enters and which is free from any sentimentalism with respect to these always unfortunate and also more or less dangerous beings. This defensive function of society is wrongly called the right to punish, not alone because

[1] *Marion*, "La solidarité morale" (Paris, 1897); *Izoulet*, "La cité moderne"; *De Koberti*, "Le psychisme social" (Paris, 1897); *Baldwin*, "Social and Ethical Interpretations of Mental Development" (New York, 1898). Contra to the illusion of exaggerated individualism, more common among artists, but which has been the basis of political doctrines, see *Max Nordau*, "Die Degeneration"; *Ferri*, "I delinquenti nell' arte," Cap. VIII.

it is also exercised, or I might say principally exercised, through measures which have nothing penal in them (as we shall presently see), but even more because the word punishment always implies a remnant of the medieval ideas of expiation and retribution as the final end, and of pain and torture as the means of attaining it, a means which finally becomes an end in itself. For it is a constant psychological phenomenon that things first sought as means (for instance, books of instruction or money for the need of life) are later desired and considered as being their own proper objects. Thus books are put on library shelves with pages uncut, and money is accumulated in the strongbox of the miser. For the future the social function must have the welfare of the collectivity as its single object and effect. One of the first conditions in bringing that about is respect for human personality of criminals, confined as a clinical measure of preservation, as with ordinary sick people in hospitals or the insane in asylums.[1] By similar reasoning, the different anti-social acts, which provoke an individual or collective reaction, should not all be termed crimes, not alone because those committed by the insane or those not caused by evil motives are not real misdeeds[2] even in public opinion; but because the word crime always implies the idea of free will abandoning the straight road. Now such an idea is disproved by the results of psychology. It would be better for the moment to follow the example of Carmignani (already imitated by Berenini) who never speaks of crime and punishment but employs offense and defense, or better still, when the scientific data of the origin of delinquency shall have passed into the common consciousness, to speak of the moral malady and of the preservative clinic.

§ 243. Social Accountability in Place of Moral Responsibility.

Let us put aside words which always end in changing their meaning whenever the ideas change, as has happened in the case

[1] *Ferrero*, "Le progrès moral," R. P. (December, 1894), showing that moral progress consists, in the last analysis, in a growing repugnance to inflict pain upon living creatures. Taking a somewhat analogous point, *Demogue*, "De la souffrance et de son imputation sur la peine," in the "Revue pénitentiare," holds, in connection with the French law of 1892, which dates the sentence from the day of detention, that the sentence should be based on all the penalties and suffering that have been undergone, and, on the other hand, exclude all suffering which does not make for his betterment.

[2] *Carrara*, "Programma," § 86.

of the very word penalty, whose earliest meaning was compensation and not an act of retributive justice.[1] Now that we have excluded the idea of moral responsibility from the legal field, an idea which is denied by positivist psychology and which is impossible of definition and which at all events belongs to the moral or religious order, what other criterion shall be proposed as the basis and rule of the defensive social function if we wish to avoid the reproach made us by some adversaries of thus reducing penal law to a mechanical struggle of blind, brute forces and of lowering the judge to the level of the murderer? Guyau, in summarizing the ideas of the most illustrious English psychologists on the problem of moral responsibility, having denied free choice, rightly points out that "in the end they all invariably have recourse to social accountability.[2] Then, examining in a very short chapter the ideas of Stuart Mill on this social accountability, the sagacious critic disclosed many weak points in the disconnected observations of that psychologist and concludes: "let the English school deny the existence of moral liberty and, hence, the possibility of attaining to a perfect and truly legitimate sanction, so be it. But the questions should be frankly put and logically solved."[3]

That is precisely what I have tried to do elsewhere and what I am again trying here, I repeat, in coördinating better my ideas to render myself yet more worthy of the praise of another and benevolent critic. The two poles between which all social science that mirrors life oscillates are the individual and society. If, therefore, you deny that the reason of responsibility is in the individual, there is nothing else to do but to place it in society. Without lingering over other discussions of sociology and law, it suffices for my purpose to say that the natural and positivist moral sciences coincide in demonstrating that the individual, whatever be his

[1] In the moral and legal sciences, words have changed their meaning with the advance of civilization and each word has a history; *Niccolini*, "Questioni di diritto" (Naples, 1869), I, 160. Also, *Ardigo*, "La morale dei positivisti," p. 417. It is still said that steamers *sail* for America, employing a phrase which corresponds to an earlier stage of maritime life. Crimes are still punished in phraseology, while in fact we should defend ourselves from them. The meaning of the word "punishment" has changed in all the phases of its evolution; and this fact is not recognized by *Hamon*, for example, in "Déterminisme et responsabilité" (Paris, 1898), p. 234, in accusing us of contradiction because we speak of punishment as a means of social defense against crimes, which do not depend on the moral freedom of the delinquent.

[2] *Guyau*, "La morale anglaise contemporaine" (1879), p. 346.

[3] "Nuova Antologia" (1 June, 1882), pp. 581 *et seq.*

species, does not exist only as such, in himself ("selbstwesen" as the Germans say), but rather as a member or an element of a society ("gliedwesen"). Just as cells, tissues, and organs have no biological existence in the animal body except as parts of a whole, so man, the family, and the community, have no sociological existence except as members of a more vast society. They have no sociological existence because, without society, there is no law and without law it is impossible for men to live together. This is why the two opposite systems, absolute and metaphysical individualism, and absolute and metaphysical communism, are equally wide of the truth; neither has the individual any existence in himself without society nor can society be abstracted from the individual and his personal relations, either organic or psychic. If, therefore, in this eternal strife between the individual and society, we refuse the latter ability to justify its defensive function by the moral responsibility of the individual, only two possible solutions remain either to deny this function to society or justify it by the principle of social accountability. It is beyond any doubt that the State, and society like any other living organisms, have the right of self-preservation, or, more accurately, the natural necessity to defend themselves like any other living being, only in different forms corresponding to the differences between an individual and a social organism. To every argument opposed to them in this regard society, and for it, the State which is its juridical expression, might answer, as did the ancient philosopher before whom the existence of motion was denied, by moving effectively for their defense and preservation. Thus the usual objection offered us with a persistence worthy of a better cause by the representatives of the traditional ideas falls and disappears when they say that with the elimination of liberty in man all his moral responsibility ceases and that consequently society no longer has any right to punish. This objection, natural enough in those who are preoccupied with the idea of moral liberty, is also put forward by many metaphysical determinists. Robert Owen, for example, places it at the base of his whole socialistic system. It is met in the juridical field by the irresistible necessity of society to provide for its own preservation. As to the moral question, it suffices to say that all contradiction disappears when the mystical meaning, of which we just spoke, is no longer given to the word punish, and when the necessarily determined individual act (the crime) is considered as the determining cause of an equally necessary reaction (the penalty), and,

where this is lacking, of a no less necessary individual reaction (lawful defense). Then, as I wrote,[1] the criminal will say to the State: "Why do you punish me for an act from which it was impossible for me to abstain?" And according to us the State will reply: "For the sole reason that I likewise am unable to abstain from punishing you in the defense of law and society." There is here perfect mutuality and, hence, perfect justice. Should the criminal try to impair the right of society to punish, by asserting with Reid,[2] "that he did wrong because he could not do otherwise and that necessity knows no law," the State can reply to him, "But I, too, punish because I cannot do otherwise and I, too, assert that necessity knows no law." In the consideration of the problem of responsibility in relation to the denial of free choice, our adversaries are in error in pausing with one-sided considerations and adopting only the point of view of the criminal. A merchant thinking to gain weight in merchandise bought at the equator for sale at the poles, would miss his calculation in centering his attention only upon the merchandise and forgetting that the scales also gain in weight in the vicinity of the poles, because of the shorter distance to the center of the earth. A similar error is made when only the individual is considered and when every penalty is branded as unjust which is applied to acts not morally free. Assuredly, if the criminal obeyed a moral necessity and if the State were morally free, every penalty inflicted by the latter for an act that was unavoidable would be absurd; but if the State and its representative are under necessity to punish, that is, to defend themselves, then everything becomes logical and natural and conforms perfectly with universal determinism. The same thing is true in the course of everyday life: when I react to an insult, it is error to tell me that I should not have been offended since the offender has no free choice; for, in turn, I am not free not to react: he insults me from necessity, but it is also from necessity that I react. Rather than abandon children and pupils to their physio-psychological expansiveness only afterwards to restrain their inevitable excesses by trying at the most, and quite uselessly, to anticipate them by warnings and threats, it were better to provide outlets for their activity, to give it useful directions by employing it in suitable occupations and especially by safeguarding it from shocks and irritating

[1] *Ferri*, "Teorica dell' imputabilità," p. 422.
[2] *Reid*, "Essays," Chap. I.

disappointments. And the same may be said of adults and of their coexistence in society.

§ 244. Public Opinion and Social Defense.

It is true that public opinion, influenced by the old ideas, is still more or less refractory to this positivist conception of law and social defense and resists the propagation of our ideas among those who are in the majority and who judge not from the results of patient and exhaustive studies, but only in accordance with the intuitions of sentiment and mental habits. This cannot be helped: beneath the surface even to-day, without accepting entirely the scientific reasons of the new school, the citizen always, or nearly always, bears the consequences of his acts whether by damages paid in a civil suit, fines imposed for police contraventions and involuntary offenses, inclusion in an insane aslyum, or detention in a prison. Still, there is a great and ineffaceable difference between the last of these consequences and the others: viz., in the cases of damages, contraventions, involuntary offenses, and the insane asylum, public opinion does not place on the person sentenced the brand of its contempt and hatred; whereas, when the guilty one is imprisoned for a real misdeed, he is considered as radically bad and is overwhelmed with scorn. This obstacle is quite serious, since it is due to an actual fact — a general sentiment — and not to a process of reasoning. It is, however, only a relative idea and in no way weakens the truth of our beliefs, although it can retard their expansion. It might be answered forthwith that even in the case of indemnity, involuntary crime, and confinement for insanity, there is always present in public opinion a certain moral reaction, more or less variable, but which amounts to a lack of respect or a damaged reputation. Still, experience shows that public opinion changes in the course of time, in accordance with the prevailing ideas in the succession of realized progress which opposes future progress. Of this history gives striking proofs.

§ 245. History of Treatment of Insanity.

Less than one hundred years ago the insane were punished as guilty and were objects of public execration, because the effect of a diseased organism was imputed to their malevolent will.[1]

[1] Dr. Heinroth wrote about the year 1800, "Insanity is the loss of moral responsibility, and never depends upon a physical cause. It is not a disease of the

It was only after the efforts of Chiarugi and Pinel, — preceded, as Alvisi [1] has shown, by those of Valsalva d'Imola, that society became convinced that insanity is like any other disease and requires the care of the physician and not the whip of the galley master. And yet, whoever had maintained that the poor demented person, the poor demonomaniac, should not be considered as morally responsible for his insanity, nor as evil, and worthy of punishment and contempt, would have deeply shocked public opinion which admitted non-culpability only in the most evident cases of violent mania. Appearances and ignorance saved the furious maniac and consigned the demented victim of hallucinations to chains and the executioner. It was only by a slow evolution of psychiatry and of public opinion as its counter-effect, that the modern opinion was reached that the insane are not responsible for their acts. As Dubuisson [2] remarked, about 1800, the irresponsibility of the insane was as yet admitted only in the rare and evident cases. The field of delinquency (by free will) was vast while the field of insanity (due to pathological conditions) was limited. Esquirol caused the first progress to be made with his theory of partial or monomaniacal insanity, a theory now rejected by psychiatry which regards these forms as only the most apparent symptoms of a general psychopathic condition. The theory served to extend the idea of insanity even to the least-evident cases of mental infirmity. A second step was accomplished by excluding the doctrine of the monomaniac forms considered as nosological entities existing in themselves and, hence, conceding irresponsibility of the insane whatever might be the apparent

body, but a disease of the mind, a sin. Any man who throughout his life keeps the image of God before his eyes and in his mind, need never fear a permanent loss of reason," cited by *Ribot*, in "La hérédité psychologique," 2d ed., p. 140. This is why, in the Middle Ages, the treatment of the insane consisted for the most part in chastisement and exorcisms. Indeed, it was not unusual for torture and even capital punishment to be inflicted. *Leidesdorf*, "Treatise on the Mental Diseases," *Maudsley*, "Responsibility in Mental Diseases." Among criminalists *Rossi*, in the middle of the nineteenth century, wrote in his "Trattato di diritto penale," Bk. I, Chap. IX, "Many crimes, above all the most frightful and atrocious, are at the moment of their commission, the effects of true monomania. But this momentary eclipse of reason is imputable to the man, as the result of his entire life, of a life of freedom (!). We are, therefore, in nowise scandalized or astonished to see human justice strike patricides and murderers, although clearly monomaniacal, with its axe. Their punishment is useful, but even more just than useful."

[1] *Alvisi*, "L'antico ospedale dei pazzi" (Bologna, 1881).

[2] *Dubuisson*, "De l'évolution des peines en matière de responsabilité," A. C. C. C. (15 March, 1887). See also *Cobade*, "De la responsabilité criminelle," Chap. II, "Doctrine de l'irresponsabilité, ses variations, ses progrès."

connection between each of the acts committed by them and the special delirium that characterized their pathological condition.[1]

[1] To show the absolute insufficiency and the uncertainty of the classical theory of moral responsibility in the matter of distinguishing the insane from the criminal, we will give the following characteristic example:

In cases of partial insanity, *Mittemaier*, "De alienationibus mentis" (Heidelberg, 1825), and *Mori*, in his "Scritti germanici," II, 125, established this legal rule, excellent from the point of view of logical symmetry; — that if the act done by the monomaniac was related to his partial delirium, he was not responsible; but if this relation did not exist, he should be punished. He took the hypothetical case of the man with the fixed idea that he had a glass leg. If such a man killed another who threatened to hit his leg with a stick, he is not responsible, said Mittemaier, but if he stole a pocket-book, this act having no relation to his mania, he was legally and morally responsible as an ordinary thief. *Carrara*, "Programma," § 249, accepts this theory in full.

But now that psychiatry has demolished the theory of monomanias, what should criminal law do? Of course, it must change in accordance with the data of the science of psychiatry and give up this first theory, logical in form, but childish and lacking scientific foundation. In fact, Mittemaier, speaking of the second edition of the "Programma," said that in view of the progress of psychiatry, he abandoned his legal theory.

And yet Carrara did persist in upholding his theory "in the year of grace 1886!" And in reporting a case noted by Brierre de Boismont, of a man with a fixed idea that his blood was poisoned by washing his hands in a vase containing a sub-oxide, he said, "if some one had struck this poor man's hands with a thong and he had killed him, I would have acquitted him, but I do not believe that he was entirely insane and therefore if he had committed rape, I would have convicted him" (§ 249, N. 2). And who would believe that in the mysterious paths of systematic delirium (paranoia as it is now called) rape and robbery are not associated with poisoned blood? The insane man can fancy, for example, that he will free his blood of this poison by violating a woman. And is it not a frequent illusion, even in criminals who, though not insane, commit rape that this act and other obscene acts on young girls cure venereal or syphilitic infection? Or, on the other hand, the insane may commit robbery to buy some drug that he believes necessary for the cure of his blood. Such are the data of psychiatric study, very different from the syllogistic conclusions of abstract criminal theories. And yet this theory of Carrara is that of *Chauveau and Helie*, "Théorie du code penal," 1, § 841; of *Pessina*, "Elemente" (Naples, 1882), pp. 219–220; and of *Canonico*, "Del recto e della pena" (Turin, 1872), p. 149. Some among the classicists have, however, abandoned this naïve theory, for example, *Bernes*, "Treatise on Criminal Law," who cites Art. II of the Canadian Penal Code of 1893; "A person who is controlled by a mental aberration on a particular point, but is otherwise sane, should not be acquitted on account of the mental alienation, unless his aberration led him to believe in the existence of something, which if it had existed would have justified or excused his act."

The opposition of contemporaneous classical criminologists to the positive theory of the social responsibility of all criminals, including the insane, determined by the most recent data of criminal psychiatry and anthropology, resembles too much Carrara's opposition to the analogous innovation of psychiatry in the special case of monomanias for this error of the great criminologist not to be very instructive.

§ 246. Moral Insanity.

Thereafter, the psychopathological field grew in comparison with the field of delinquency, due to the conception of what is called moral insanity in which the intelligence may remain intact, or nearly so, while the disease attacks the sentiments only, and especially the moral or social sense. But just as happened with regard to cases of monomania, psychiatry no longer admits a distinct species of morally insane, since Lombroso has proved that moral insanity consists in congenital delinquency. This happy demonstration of Lombroso has been for modern psychiatry something like the egg of Christopher Columbus, and with it criminal anthropology enters into the last phase where every absolute division between insanity and crime is lost, although there subsists between them distinctive clinical characteristics just as between the different special forms of insanity and crime. Madmen and criminals thus reënter the large and unhappy family of the abnormal, the diseased, the degenerate, and the anti-social.[1]

Nothing is more natural and nothing better corresponds to this scientific evolution of psychiatry and criminal anthropology than the theory which I have maintained on social accountability, without moral responsibility on the part of those who commit acts inconsistent with the conditions of social existence. With this view we are at liberty to adapt the forms and criteria of this common social accountability to the particular conditions of the criminals themselves according to their classification as insane, born, habitual, or criminals by occasion or by passion.[2] Opposed to this radical innovation in juridico-criminal theories, is the general hostility of public opinion and the jurists accustomed through the classical theories of a more or less exact and com-

[1] It is necessary, however, in this matter, as it is in the distinction between atavic and evolutive criminality, to distinguish the involutive abnormals, who are without human and social value, from the evolutive abnormals who, on the contrary, often fulfill a useful progressive function through their psychological qualities of monodeism, philoneism, and spirit of sacrifice, fanaticism, and non-conformism, which makes them reject the conventional lies of mental prejudice and habit.

Ferri, "La réhabilitation des anormaux," R. R. (Feb. 15, 1899).

[2] Necd I repeat that my phrase "social responsibility," that is to say, the responsibility of the individual toward society (from which the co-responsibility of society toward the individual cannot be separated for social criminogenitive reasons), is entirely equivalent in its content to the formula "social reactivity" which *Hamon*, "Déterminisme et responsabilité," last section, would substitute for it?

plete moral responsibility, to consider criminals as the non-violent insane were formerly considered. Nor can this hereditary remnant of the former ideas be dissipated by argument alone. As Maudsley observes, "history demonstrates that practice survives a long time after the theory which inspired it has been generally discredited." But, sooner or later, science will succeed in changing public opinion and in causing the acceptance of the theory that even criminals are more or less unfortunate individuals impelled by the abnormal state of their organism to crime from tender infancy or deprived of sufficient force to resist the impulse of occasion. Then what has now occurred in the case of the insane will occur in their case; they will no longer excite hatred, contempt, or cruelty, but the inexorable necessity for their separation from other men by society whenever preventive means prove inadequate will still remain. Even in our day, especially in relation to the more unusual and brutal crimes, a reflection of this scientific way of considering crime as a phenomenon of individual and social pathology is beginning to penetrate into public opinion.[1]

§ 247. Basis of Right to Punish.

Having established that (either with or against current public opinion) society cannot be denied the right of self-preservation irrespective of the moral responsibility of the individual, the sole foundation of criminal science, and of the agency corresponding to it, must be social accountability. Yet this idea, hitherto completely neglected in the writings of all criminologists,[2] but on the contrary frequently given expression in the works of

[1] *Fouillée*, "Les transformations futures de la morale," R. D. M. (15 August, 1888). I do not believe, however, that science should preserve the "practical" element in the conception of responsibility in regard to mental habits and psychological survivals, nor do, as Pozzolini among others (see bibliography in *Ferri*, "Giusticia penale," in "Giurisprudenza italiana" (1889), IV, 351) those who, while adhering "theoretically" to my radical theory of the elimination of all pretension to distributive justice, admit, however, in practice, "that the use of punishment is indispensable, as retribution for harm done, because of the influence exercised by another factor, — public opinion." But, what is the task and first duty of science, if not to oppose public opinion when it is not in accord with the data of positive observation? See *Ardigo*, "Coscienza vecchia e idea nuove" — "Empirismo e scienza," in his "Opere," Vol. IV (Patna, 1885), pp. 423, 431.

[2] In my "La teorica dell' imputabilità," P. I, Cap. VII, pp. 414 *et seq.*, I alluded to social responsibility without, however, developing the idea, and without assimilating it into my system which was then imperfect, because it was tainted with common theories and prejudices, and which has only now by a real a posteriori evolution, become accurate and complete.

sociologists and medical alienists (Stuart Mill, Despine, Fouillée, Maudsley, Spencer, Ardigo, Lombroso, Le Bon, Kraepelin, Dally, Lacassagne, Minzloff and Guyau, among others), would not, if left in its naked simplicity as they leave it, be sufficient foundation for a legal system.[1] The embryonic idea, so to speak, of this social accountability, implicitly contained in the remarks already made, may be summed up in the last analysis as follows: that in the juridico-criminal field, as in the juridico-civil field, and the extra-legal field, every man, always and in every case, determines by each of his acts a proportionate social reaction. Men always feel the natural social consequences of their own acts for which they are accountable by the mere fact that they have committed them. This embryonic idea is insufficient for the construction of a whole system of punishment, or, more accurately, for the subject of the function of defense of society, so for this reason I reserve for a little later the indication of ulterior criteria sufficient for the outlines of such a system. Still, this idea is the corner stone of the new scientific edifice; it is the supreme rule, thanks to which, by excluding from the legal field the ethico-religious criterion of "culpability or moral responsibility," we are in a position to give the only answer of a positivist character to the "terrible question": "Why may we impute his crimes to a man? Why is he responsible for them?" Everybody knows that the traditional legal philosophy has never given any other answer to the question than this: man is responsible for his acts because of his moral freedom to perform them and in the measure that he possesses this liberty. When this answer has been stripped of any scientific base by the negation of the free choice or moral liberty, the traditional legal philosophy continues none the less to repeat its "delenda Carthago": "Explain, then, why man is responsible for his acts if they are imposed on him by a

[1] It gives me pleasure to say that the most complete sociological development that I know of the principle of responsibility and of the idea of law and justice according to positive philosophy is found in *Robert Ardigo*, "La morale dei positivisti e la sociologia" (Works, Vols. III, IV). Before the most explicit, if not the most systematic and complete, affirmance of the responsibility of the insane and criminals to society, for acts committed by them, was made by Dally in 1863, in a celebrated discussion before the Paris Medico-Psychological Society, in which he concluded, "Man cannot be morally responsible for his acts, any more than he is for his diseases, which he brings into life with him or which he subsequently contracts." *Dally*, "Considérations sur les criminels et les aliénés criminels," in the A. M. P. (1863); "Sur la pretendue irresponsabilité des alcooliques criminels," B. U. I. D. P. (1880), p. 264; "La responsabilité morale et sociale," A. M. P. (January, 1882).

blind, irresistible fatality." Indeed, after all, it is the story of the egg and Columbus, and the answer to this "terrible question" is simply: "Man's acts may be imputed to him and, hence, he is responsible for them because he lives in society."

§ 248. Imputability and Responsibility.

By imputability and responsibility we understand, with Romagnosi, the possibility of "attributing a given effect to a person as the cause whereby this effect is produced"; and of recognizing such person as bound to repair a given damage by responsibility, "the possibility and to undergo a given penalty by reason of that given effect." That is to say, that there is material imputability because Titus has committed the act, and social and juridical imputability because Titus is bound to bear the social and legal consequences of his act. It is only too evident that man is materially responsible for his acts by the mere fact that he lives in society, because, when a man does an act, only another man can call him to account for it, either as an individual or as the representative of society as a whole. A man who does not live in society but alone in a desert place is not even materially accountable for his own acts, for the very obvious reason that there is no other man to call him to account. But man is also responsible legally for his acts from the mere fact that he lives in society, since, as has already been said, law is conceivable and possible only in society. The fact of living with other men is the sole source of man's rights and hence, also, of his duties. By the mere fact of no longer living in society he no longer has either rights or duties. It cannot be said that man, inasmuch as he is man, "virtually" carries in himself, in his own person, his duties and his rights, for to say that a thing exists only virtually or in idea amounts to saying that it does not exist. Whatever exists, exists in act and in fact and the ideal possibility of its existing is not enough to give it a real existence. Man absolutely alone has really neither rights nor duties for the reason that rights as well as duties, in the legal and social sense (I am not here concerned with religious duties), are a relation of man to man. Hence it is not because man has a "moral liberty" or an "ideal liberty" [1] or

[1] "In a word, moral legitimacy of punishment is deduced from ideal liberty conceived of as the principle of right, and its social legitimacy from the common acceptance of this ideal by means of a contract." Thus Fouillée, one of the best

a "relative liberty" of action that he is legally, that is, socially, accountable or responsible for his actions: it is only because, from the moment that he lives in society, every one of his acts produces effects, both individual and social, which rebound from the surrounding society upon the individual himself. He therefore, necessarily and inevitably, by the mere fact that he lives in society, must feel and bear these effects which are good and useful for him when his acts have been good and useful for society and which are harmful and evil for him when his acts have been harmful and evil for society. As Holmes has well said in relation to civil responsibility (and in our view it is also applicable to penal responsibility): "The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent and negligence. Hence, it may naturally be supposed that the risk of a man's conduct is thrown upon him as the result of some moral short-coming. But while this notion has been entertained, the extreme opposite will be found to have been a far more popular opinion; I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter."[1] There is, therefore, only one means by which man ceases to be responsible for his acts; that means is to renounce all society.[2] In this sense, one might say in returning almost to Rosseau with Renonvier and with Fouillée, that social responsibility in a fashion has its base in the contractual acceptance of life in common: yet this element of contract is so infinitesimal and even, so to speak, so negative (since man is placed by fate in society and cannot carry out all his desires) that it cannot be taken as the basis of a sociological system, whatever may be its influence upon particular problems of sociology. All of this amounts to what is the first declaration upon which the positivist criterion of responsibility rests, namely, that every man is always responsible for every anti-juridical act performed by him, solely because and in the measure that he lives in society.

philosophers of law, expresses himself, which reveals the tendency to eclecticism which always destroys some of the force of a thought and lessens originality, when it does not overcome truth.

[1] *Holmes*, "The Common Law," p. 79.

[2] I have applied this general principle to aid in suicide or homicide with consent in "Omicidio-suicidio," 4th ed. (Turin, 1895).

CHAPTER V

ECLECTIC THEORIES OF RESPONSIBILITY

Relative freedom of will; limited, ideal, practical. Liberty of intelligence. Voluntariness. Intimidability. Normality. Personal identity and social resemblance. State of criminality. Conclusion.

§ 249. Necessity and Free Will.

One of the other two theories which radically differ on the fundamental principle of responsibility is the criterion-measure theory. On the one hand, there is the classical theory which places this principle exclusively in the individual who acts, requiring as constituents of his penal responsibility, not only what goes without saying, the physical responsibility, which he incurs as the material author of the crime, but also moral responsibility, in that he is the "intelligent and free" author of it, as Romagnosi said a century ago, and as all the classical criminalists have since repeated. It is true that Romagnosi, the most positivistic mind among the classicists, said that moral responsibility is the condition and not the measure of penal responsibility.[1] The common classical theory has not followed that great master in this particular, since his criterion-measure or criminal impulsion rendered the solution of juridico-criminal theorems in the matter of responsibility less easy and less diagrammatic. For this reason, doctrine, legislation, and decisions have, on the contrary, followed what I will term the criterion-measure of responsibility, because it is of quicker application and, moreover, offers those appearances of mathematical proportions which are so

[1] *Romagnosi*, "Genesi del diritto penale." There can be no penal responsibility without moral imputability — But should the former always be in proportion to the latter? The habit of weighing the merit or demerit of human acts by rules of subjective morality often results in the substitution of the responsibility of conscience for that of common safety. But can legal reason and politics permit such a substitution? — Every one knows political responsibility differs from moral responsibility, and why should the latter alone be used to measure the duty of those who defend and insure public safety? (§§ 527, 600). "Moral imputability by itself serves only to show *when* not *how* nor *to what* degree punishment can and must be inflicted" (§ 1333).

easily mistaken for the rules of justice. This dosimetry, as Mario Pagano [1] with childlike candor said a hundred years ago, would consist in this, that when the plentitude of liberty and intelligence exists, or is supposed to exist, in a criminal his moral responsibility and his penal responsibility are equally complete; and vice versa, if liberty or intelligence be totally lacking in the agent, his moral and penal responsibility is null; if intelligence or liberty be lacking in the proportion of a quarter, a third or a half, in the same way the moral and penal responsibility diminishes by a quarter, a half or a third. Nothing has greater arithmetical symmetry and nothing is more absurd from the psychological point of view, just as it was at one time assumed that man could be partially insane and that in his brain insanity and reason lived together as good neighbors in two distinct apartments. In the same way it is assumed that in the will of man necessity and liberty coexist in separate apartments. As I have already said, nothing is more dangerous from the social point of view because while every diminution of the alleged moral responsibility actually coincides with an increase of danger to society from the individual who misconducts himself through lack of normal intelligence and will, such lack involves for him a diminished penal responsibility, with the consequence that the defense (of society) diminishes or disappears as the peril increases. Still, I repeat, this common theory of moral responsibility as the condition and measure of penal responsibility afforded too easy an application and too great an appearance of logical symmetry not to compel the unanimous assent of the classical criminalists. We, on the contrary, relying upon the new data of biology and criminal sociology, offer a positive theory of responsibility radically opposed to the foregoing. In our theory punishability or, more accurately, society's defense against criminals, still has its root in the individual considered as the material author of a crime which is the index of his physio-psychological personality reacting against the physical and social environment. Hence, the objection made by some metaphysical critics is childish, — that it is absurd to speak of social accountability since accountability can only be individual; as if in speaking of social accountability we meant the accountability of "society," and not that "of the individual in relation to society." Yet the reason of this accountability in the individual for crimes committed by him does not depend solely

[1] *Pagano*, "I principii de codice penale," § 1.

upon his personal conditions; and, hence, his moral responsibility is not a condition of his penal accountability, which depends upon the sole fact that the individual lives in society.

§ 250. Development of Rights.

Outside of social life there are neither rights nor duties. Every right represents a conquest and daily struggles have been necessary for its recognition. Hence, while the metaphysical partisans of a "natural law" eternal and absolutely antecedent to society and the State charge positivists with undermining every solid foundation of individual rights, we maintain that only the positivist and relative conception of these rights, as an historical conquest, spurs public consciousness in the struggle to conquer new rights and encourages and strengthens us with the conviction that as the law of to-day is advanced over that of yesterday, so the law of tomorrow must certainly also change and progress beyond the law of to-day. Every act of the individual induces a corresponding reaction on the part of society. If, therefore, the individual act concerns the juridical order, these sanctions take a juridical or legal form and the individual as the material author of an act answers for it to society independently of his moral fault.

§ 251. Eclectic Theories of Punishability.

Indeed, the conditions of the act, the agent, and society influence the form of the legal sanctions and, hence, furnish[1] a measure of the social or juridical responsibility of the criminal because the social reaction must correspond to the individual act; — the defense must be proportionate to the offense. In the meantime, the principle and reason of penal responsibility are clearly drawn by these two opposed theories: the ethical-individual theory of the classical school and the juridico-social theory of the positivistic school. Intermediate between these two opposite theories, which are radical because logical and as such the only ones theoretically possible, there have sprung up, under the guise of transitions or compromises, various eclectic theories according to which the criminal is morally, and therefore penally, responsible because there is found in him or in his act the following characteristics.

[1] See Chap. VI, VII, *post.*

RELATIVE LIBERTY OF THE WILL
- *Limited.* — Ellero, Tolomei, Buccelati, Canonico, Brusa, Pessina, Bovio, Prius, Rolin, Joly, Krafft-Ebing, Züno, Riant, Garraud, etc.
- *Ideal.* — Fouillée, Siciliani, Waatrain-Cavaganari, *by the personal factor* — Lévy-Bruhl, Magri, Moriand.
- *Practical.* — Salleilles, Pozzolini.

LIBERTY OF THE INTELLIGENCE — Kleinschrod, Hälschner, Berner, Schütze, Holtzendorff, Vida, Conti, Laurent.

VOLUNTARINESS — Penal Codes of Spain, Hungary, Italy, Draft of the Russian Penal Code, Beausaire.

INTIMIDABILITY. — Dubuisson, Impallomeni, Alimena, Cuche, Lanza.

NORMALITY. — Poletti, Liszt.

PERSONAL IDENTITY AND SOCIAL RESEMBLANCE. — Tarde.

STATE OF CRIMINALITY. — Poustoroslew.

§ 252. Eclectic Theories of Responsibility. Limited Relation. Liberty of the Will.

There is, as one may see, a progression in these eclectic theories which extends from the most spontaneous, like the adaptation and reduction of the classical criteria of the free will and free intelligence, to the most ingenious and indirect theories, such as the more or less original invention of criteria different from the traditional.[1] Indeed, at the start they began to recognize that the new data of biology and criminal sociology removed in part the illusion of an absolute and unlimited moral liberty in man, and thus destroyed his absolute moral responsibility. But under the influence of this preconceived idea that there is no penal accountability without moral responsibility, there has been unwillingness to concede that the physio-psychological hereditary conditions of the individual combined with the pressure of the environment could ever completely destroy the moral liberty, or free will of man. This volitional freedom, they say, may be in fact slight;

[1] I have not been able to include the theory of *Silio y Cortes*, "La crisis del derecho penal" (Madrid, 1891), Chap. I, which is an acceptance of the positive principle of social defense as the reason of individual responsibility and punibility, with reservations in favor of free will.

It is, therefore, an eclectic theory, for Silio accepts and develops with much eloquence the deductions of the positive school, preserving at the same time as a sort of addenda unconnected by any organic tie to the rest of his ideas, the belief of free will. This is a more or less conscious concession to the spiritualism still dominant in Spain, just as Spencer's "unknowable" was a concession to the deistic spiritualism in England.

The same can be said of *De Baets*, "Une question touchant le droit de punir," in the "Revue néo-scholastique" (Feb. 1897), when a professor in the Catholic University of Louvain accepted the data of criminal anthropology, but made it accord (?) with free will, as he stated in so many words before the Anthropologico-criminal Congress at Geneva, A. C. A. C. (1897), p. 310.

but there is, must always be, a fragment of it in man, and it must be that he chooses evil because otherwise the lapse into fatalism and responsibility becomes impossible. We no longer require a meter of it as heretofore; but it is convenient, it is indispensable, that we should have a centimeter or a millimeter of it.

This expedient is evidently as convenient as it is untenable: once entangled on the slope of concessions to determinism against the absolutism of free choice, one is no longer able to stop at half or two-thirds of the distance in order to salvage a slight remnant of this liberty of will. One must go through to the end and "limited liberty" is a logical and psychological absurdity, because one is unable to see why these individual exterior conditions which may suppress one- or two-thirds of the free choice would never (aside from obvious cases of insanity) be sufficient to suppress it altogether. This is why Carrara, with his powerfully logical and systematic mind, very clearly saw the conclusions to which one is unavoidably brought from the moment that one becomes involved on the descent of concessions to natural determinism, and he went to his grave without having made any concession to the new theories, encasing himself with inflexible obstinacy in the impenetrable armor of his absolute syllogisms.

§ 253. Eclectic Theories of Responsibility: Ideal Liberty.

Others have added to this more convenient conception of a simple quantitative limitation of volitional liberty other concepts of a freedom that is always relative, also, but qualitatively different. Thus Fouillée speaks of an "ideal liberty" progressively formed and developed as an idea-force which alone produces "the moral legitimacy of punishment; for the reason, as Siciliani said after him, "that man is not free but becomes free."[1] There is no need to show at length the theoretical and more particularly the practical insufficiency of such a criterion. How is it to be decided whether a man in the commission of a crime had or had not the "idea of his own freedom"? When one studies criminals in the flesh and not in the imagination it seems, indeed, that they have not this "idea of their own moral liberty"; in fact, they almost always admit that they have been drawn to crime, powerless to resist the impulse of vengeance, cupidity, or luxury,

[1] *Fouillée*, "La science sociale contemporaine," "La liberté et le déterminisme"; *Siciliani*, "Le questioni contemporanee e la libertà morale"; *Wantrain-Cavagnari*, "L'ideale del diritto" (Genoa, 1883).

or, in the ultimate hypothesis, divine will. In such admission, they do not mean to seek an excuse or a pretext for immunity. On the contrary, to the same extent that they are conscious of their own powerlessness to resist criminal impulsion, they are conscious of the right of society to punish them. "I did wrong: I have been taken in it: I must pay for it": such is the answer made to me by more than a hundred convicts, especially recidivists who, however, add that on other occasions "they have had more luck." This answer has a great psychological value, since it was not an hypocritical and egotistical pose to elicit pity or protest against the sentence: quite the contrary, they concede its justice although this "idea of moral freedom" imputed to them by theoretical philosophers does not in the least illuminate their conscience.[1] Even conceding that there exists in criminals an "ideal liberty which is formed progressively," how is its intensity and range to be measured when their moral responsibility, hence their punibility, depends on its greater or lesser power? It is unnecessary to add that this "ideal liberty" has some resemblance to the liberty "of an intelligible character" of which Kant and Schopenhauer speak, who, after the denial of all moral liberty "of an empirical character" in man, in the actual world of phenomena, and in "practical reason," invented in the world of noumena and in "pure reason" an "intelligible character," in which should be found an ideal liberty of man. These are transcendental concepts, ingenious creations, which denote a great wealth of logical and philosophical imagination but which are devoid of any positive reality. Another opinion which still retains a certain residue of moral liberty in man represents this liberty under the form of what might be called the "personal factor," — a factor which concurs in every voluntary deliberation, in deciding one way or the other the conflict between the internal motives and the external circumstances. Thus, for example, Lévy Bruhl, after noting that responsibility has an objective aspect (in part corresponding to what we call social accountability) and a subjective aspect (moral responsibility), and after intelligently analyzing both, admitted that the objective accountability of each one for his own acts is sufficient for social life. Moreover, he insists on the necessity of dividing the notion of responsibility, retaining in penal legislation only the notion of a purely objective accountability. Thus far he is in perfect agreement with the positivists;

[1] *Ferri*, "Atlante antropologico e statistico." On "L'Omicidio," pp. 139 *et seq.*; *supra*.

but he superadds a subjective responsibility to the objective accountability because "it is to man considered in the essence of his personality that decisions affecting him should be made to relate." [1] However, he avows himself that of this subjective responsibility, "we can give but a symbolical representation and not a notion properly so called." But this supposed need of a subjective responsibility as an antecedent and condition of objective responsibility, is still, without speaking of other objections, an equivocation. Since it is an error to say that the norm of absolute ethics "evil deserves evil" is an antecedent of the rule of positive law requiring the punishment of crime, because on the contrary it is from the experience and memory of these social communal positive rules (defense-vengeance) that men draw the abstract and symbolical idea of this normal rule, — so, also, is the abstract idea, or metaphysical symbol of subjective responsibility drawn from the experience of objective accountability. It is, therefore, not true that morals precede social life nor that subjective responsibility precedes objective accountability. Precisely the contrary is true, for, as Mara said in controverting Hegel, it is not the idea which determines reality; the real conditions of life determine consciousness and ideas. The defensive and avenging reaction against every act contrary to the conditions of individual and social existence is the primitive fact inseparable from all life in society, even among the animals.[2] It is, therefore,

[1] *Lévy-Bruhl*, "L'idée de la responsabilité," p. 105. To the same effect, *Moriand*, "La question de la liberté et la conduite humaine" (Paris, 1897), p. 200, concluded "The basis of responsibility is the entity ("être"); a man is responsible because he is a man, seeing that he is a self-existent something." Consequently, "there is in every free (?) man, some other basis for responsibility over and above free will."

[2] "The instinct (connected with that of self-preservation) after having created the complex system of penalties and rewards is now fortified by the very existence of this system. Men have not been slow to recognize when they offended others that in a certain fashion they must expect to suffer repression; thus a natural and rational association (already pointed out by the English psychologists) was established between the given conduct and its corresponding chastisement. In the "Revue philosophique" (Apr. 1885), *Delbœuf* reported a curious example of a similar association in an animal. "A small dog was carried into a certain part of the garden and whipped every time it jumped on a certain desk. This system of education corrected its fault but sometime afterward it again jumped on some furniture but immediately raced out to the place where it had been whipped before and awaited there in a comical attitude of remorse and expectancy." Romanes reports similar incidents. *Guyau*, "Esquisse d'une morale sans obligation ni sanction."

This fact, which is characteristic to the psychologist and which seems to be an insignificant anecdote for all those who have no feeling for scientific experiment,

the material base and real determinant of the norms of morality. From those norms, the fact receives no justification: it still continues to be a fact when juridical science renounces any idea of subjective responsibility, just as it continues to be a fact after the renunciation by criminal science of the rule that evil deserves evil, without any noticeable scientific moral or social upheaval.

§ 254. Eclectic Theories of Responsibility: Practical Freedom.

More recently, it has been thought possible to rest responsibility, I would not say upon a theory, but upon an eclectic expedient, by saying that penal justice has an adequate "positive" base in what might be called, in accordance with public opinion, "the practical liberty" of individuals. Just as the crowd, that is to say, public opinion created by traditional prejudices and mental habits, holds man responsible because in practice he is able to abstain from committing crime and because it always considers punishment as retribution for a fault, so, also, criminal science and those who exercise the penal function are powerless to embrace the more logical (if more difficult of popular comprehension) criterion of social and objective accountability proposed by the positivist school. It was Saleilles who, reproducing and developing an objection by Liszt,[1] offered this expedient and it has received, I know not how, the assent of a young Italian positivist.[2] In a work on the individualization of punishment, which made the passing stir in the scientific world, such as efforts toward eclectic conciliation always do, by flattering, without too

is similar to that which I have reported as happening to *Ardigo*, in "Negazione del libero arbitrio," p. 417. A dog which bothered its master in the dining-room was whipped by him several times in succession each time that the cloth was laid for dinner, with the result that without even being struck the dog knew immediately, as soon as he saw the table-cloth, through a natural psychic association. *Brehm*, "La vita degli animali" (Turin 1872), I, 214, 354, remarked the same on the subject of a leopard, which entered its cage only when it was sprinkled with fresh water and "finally he would reënter it, although apparently with repugnance, whenever he saw a garden hose." Compare here my observations on the psychology of punishment which is very efficacious when it gives the concrete sensation of imminent pain, while it has little effect as the abstract idea of a distant pain. See also "Omicidio," p. 20, §§ 251 *et seq.*

[1] *Liszt*, "Die strafrechtliche Zurechnungsfähigkeit," Z. G. S. (1896), p. 70, an address before the International Congress of Psychologists at Munich, August, 1896.

[2] *Saleilles*, "L'individualisation de la peine"; *Pozzolini*, "Bases para una teoría positiva de la responsabilidad penal," in the "Revista general de legislación y jurisprudencia" (June, 1899), and in "In onore di Francesco Carrara" (Lucques, 1899).

greatly compromising himself, the traditionalism hostile to novelty and those eager for innovation, Saleilles said: "the good in the classical system is in its principle (or moral and subjective responsibility) and the evil lies in the conclusions that are drawn from it; whereas, inversely in the positivist system many of the conclusions are attractive and almost convincing, while the principle frightens us." This last word is an involuntary revelation of the terror and hatred of novelty which caused Saleilles to imagine that he could construct a paradoxical kind of scientific organism by applying the principle of the classical school to the conclusions of the positivist school. It is needless to demonstrate at length that the "popular conception of responsibility" cannot be the base of a scientific theory because there would never be any scientific progress if the existing state of public opinion, or traditional prejudice, should offer a barrier to theoretical innovations brought about by the study of facts.

§ 255. Error of Subjecting Science to State of Popular Opinion.

When Pozzolini, who admits that my theory of social accountability affords an ideal system of justice for the future, suggesting only that the popular conception of moral retribution be not abandoned in punishment, and who declares that theory is "really positive," he unconsciously confuses positivism with empiricism. When Franck, quoted by Van Buri [1] and referred to by Pozzolini, says that "the movement for the reform of penal law will be careful not to totally abandon the idea of reparation or of expiation founded on non-determinism, because this idea in the actual state of public opinion coöperates with it in the attainment of its higher object, — the social efficacy of penal law," we reply that herein is error and illusion. The error is in subordinating the conclusions of science to the actual state of public opinion, just as if Pinel in his great reformation of practical psychiatry had said: the insane are truly diseased and not wicked, but as the "actual state of public opinion," or rather the "popular conception" of insanity, is that they are wicked, psychiatry should not totally abandon the idea of punishment inflicted upon the insane, since the medical treatment given them represents only the "ideal state of the psychiatry of the future." Further, a Saleilles of that time would have preserved the principle of traditional

[1] *Van Buri*, "Questioni della imputabilità," in "Revista penal" (April, 1898), p. 339.

psychiatry, and would have asserted that the insane are responsible for their mental alienation but should be cared for conformably with the "consequences" of the new scientific psychiatry and treated as patients. Substitute the insane for criminal and psychiatry for penal justice, and the eclectic expedient appears in all its beauty.[1] Besides this palpable error, there is an illusion in the empirical respect for traditional prejudice. It is an illusion to believe that one thus favors the "social efficacy of penal law" (Franck) and that one thus "gives a foundation of justice to criminal sociology" (Saleilles). How can a social function be efficacious when guided, not by scientific truth based on the natural origin and, hence, on the efficacious remedies for crime, but rather by empirical prejudice? Have we not learned from the experience of centuries of bloody and sterile inefficiency of a penal law based on the idea of reparation or expiation of faults? This is equivalent to saying that modern medicine, while retaining the popular prejudice on epidemic diseases, would see the efficacy of its methods increased by those advances which have only become possible through Pasteur's discoveries of pathogenic microbes founded on scientific data.

§ 256. Exigencies of the Idea of Justice.

As to the justice which should temper the conclusions of criminal sociology, it will always be necessary to ask as it has already been asked:[2] What are these "exigencies of the idea of justice"? What is just and what is unjust? Who can measure the subjective responsibility of the offender and meet it with a just and proportionate penalty as reparation? Once more then, there is no other solution for the problem than to abandon courageously every prejudice from the moment that its error is demonstrated and to realize that public opinion always ends in accepting and yielding to scientific truths. This is what it did in the case of the insane, after Pinel, and this is what it will do in the case of criminals.

§ 257. Eclectic Theories of Responsibility: Freedom of Intelligence.

Such are the eclectic theories of responsibility which are less removed than others from the pure classical theory. They all come back, under a form in which phantasy plays a greater or

[1] In the same sense, *Drill*, "Les fondements de la responsabilité pénale," A. C. A. C. (Geneva, 1897), p. 67.

[2] "Année sociologique" (1899), II, 3, 64.

lesser part to the moral or volitive liberty, presenting it, it is true, as relative, by limiting or making a travesty of the moral liberty which in the traditional science and in common sentiment constituted the most characteristic and essential condition and measure of moral and penal responsibility. Yet the inevitable homage to the new scientific proofs in physio-psychology has taken a little more radical form, especially among the German criminologists in an eclectic theory, wherein it has been sought to avoid the difficulty by peremptorily excluding one of the two traditional pivots of moral responsibility, the free will, and retaining the other less uncertain and less disputed, namely, the intelligence. This is the intellectualist theory first sketched by Spinosa, then by Schopenhauer, and recently taken up by Schinz.[1] I myself adopted it in the second part of "La teoría dèll' imputabilità e la negazione del libero arbitrio," and notwithstanding that I later discarded it (except the criterion of motives determining action), a certain critic has continued to combat it, as a definitive expression of my thought.[2] Indeed, the conditions of the intelligence, reason or consciousness, to the extent that man knows the relations of things and the material, social, and legal consequences of his own acts, can be neglected neither by the legislator, the judge, nor the criminal sociologist. The misapprehension in this theory is first of all that the intellectual (and general psychological) conditions should be one of the criteria, but not the essential principle of penal responsibility. Whether the criminal has an approximately normal intelligence, or whether his reason or conscience are obscured, distorted, or stifled by physiological conditions (such as youth or intoxication) or by pathological conditions (such as insanity or somnambulism), assuredly this is of great importance in applying the most suitable form of defensive social reaction to the agent who has accomplished the act under such conditions. Where the murderer, robber, or incendiary is afflicted with a clinical form of insanity (conceding that the material conditions of the act and the damage caused are exactly the same) certainly there should be a different form of reaction against him than in the case of an adult or minor criminal by congenital tendency or where he is impelled to the crime by an acute or chronic

[1] *Schinz*, "Morale et déterminisme," R. P. (January, 1895).

[2] *Gabelli*, "La nuova scuola di diritto penale in Italia," in the "Nuova antologia" (16 August, 1885); see *Lombroso, Ferri, Garofalo, Fioretti*, "Polemica in difesa della scuola criminale positiva" (Bologna, 1885), pp. 85 *et seq.*

alcoholic delirium or by a more or less social and excusable passion. Nevertheless, these intellectual conditions have nothing to do with intellectual responsibility; for, be they what they may, normal or abnormal, the individual is always responsible towards soicety for the crimes he has committed.[1]

If, on the contrary, these intellectual conditions are made not merely a criterion of adaptation of the defensive social reaction or a measure of responsibility (as the classical doctrine asserts and therefore reaches solutions in the case of extreme youth, intoxication, etc., quite different and often contrary to ours), but also the essential condition of penal accountability as derived from moral responsibility, there is a return to the pure classical theory and hence to the psychological absurdity and social peril inseparable from it. In addition to this fundamental mistake, there are others contained in this eclectic theory of responsibility. What in effect is to be understood by this "liberty of intelligence," in which is seen the condition of moral and penal responsibility? Are we to understand the word "liberty" as a certain Italian eclectic understands it, copying the German theory, in the sense of independence of the internal and external causes that determine man to action? In that event we only transfer the idea of the freedom of the will to the intelligence, and the absurdity is no less striking. Indeed, even the most orthodox defenders of free will have always recognized that the intelligence cannot be "free" in the anti-determinist sense, since the laws of logic are necessary and inevitable. Given the two premises of a syllogism, the intelligence cannot be free to reach a conclusion different from that deduced by logical necessity. Is one, then, to understand liberty as the normality and integrity of the intelligence? If so, the conception is in itself accurate and positive, but in the eclectic theory I am discussing it concedes another error. Article 51 of the German Penal Code provides: "An act is not punishable when the author at the time of its commission was out of his senses, or in a state of diseased impairment of the mental faculties that excluded the free exercise of his will." That is to say, that free choice left outside the door of the will comes back through the door of the intelligence, since the liberty

[1] This equivocation is perhaps the reason that *Puglia*, one of the earliest champions of the positive school, "Studi critici di diritto criminale" (Naples, 1885), p. 83, indicated the principle of imputability and responsibility in "intelligent determination" and "physic liberty" (differing from free will).

or normality or integrity of the will is required to the extent that it indicates or implies "the free exercise of the will." Berner, one of the most accredited representatives of this eclectic theory of imputability, expressly says that "in order that there may be imputability, *i. e.* penal responsibility, these things are requisite: consciousness or self-consciousness of the external world — developed consciousness of duty. In these conditions of the intelligence is already comprised inner liberty, and hence it is needless to enumerate it as another or the conditions necessary for imputability.[1] Among the more recent writers, Liszt (who, as I shall presently show, has since changed his opinion) in a less explicit way made this declaration: What is presupposed by penal responsibility and what is consequently the condition of imputability, is not a freedom of will withdrawn from the law of causation but merely the determinability of will conformably to law in general by means of ideas and in particular by means of the notions of religion, ethics, law, and prudence which regulate conduct. Only in this determinability of the will does penal law find a solid base sheltered from the attacks of the philosophers." [2] This still means that the intelligence is taken as the directing element of the will and as such is taken alone as the criterion and condition of moral and penal responsibility. Indeed, going back to the ancient German criminologists, Kleinschrod, after saying that "an act to be punishable must have been committed with the use of reason," immediately adds, "because without the use of reason, we cannot imagine any choice." It is true that he also adds, "that he does not understand by the use of reason, the energy of the will and the liberty of the mind in the complete sense of the expression (volitional liberty withdrawn from the law of causation, is Liszt's way of repeating him), but a certain degree of reason which is requisite in order that there should be a choice." This is the crumb of liberty that they cannot do without. But it is also true that the same author elsewhere, explaining himself better in connection with unpremeditated crimes — a thorny subject for the adherents of moral responsibility — said that conditions of punishability are two in

[1] *Berner*, "Treatise on Criminal Law." This is in exact contradiction to *Zuppetta*, "Corro di diritto penale comparata" (Naples, 1871), II, 233, that the essential element in crime is "freedom in him who commits it," this freedom including that of intelligence.

[2] *Liszt*, "Lehrbuch des deutschen Strafrechts," 4th ed. (Berlin, 1881), p. 60.

number: (*a*) The act must have been founded on the will of the agent and it must have been psychologically possible for him not to have committed it; (*b*) The agent must have been conscious of the penal law.[1] Aside from these two mistakes (confusion between liberty and normality of intelligence, and intelligence considered as the condition of free volitive determination) it is possible to offer other difficulties for this eclectic theory. First of all, as Poletti [2] said, the idea of crime or of a given crime is the same in the consciousness and intelligence of an honest man who abstains from its commission and of a criminal who commits it. The difference is that this idea is repugnant to the moral sense of the honest man and hence in him has no sufficient impulsive force for translation into action, or encounters other inhibitive energies which prevent its execution. In the criminal, the idea of the crime arouses no such repugnance, does not encounter the same resistance in his brain and reaches its external muscular realization. It is not, therefore, a difference of intelligence that determines the non-execution of the crime in the one case and its execution in the other with consequent penal responsibility.[3] Furthermore, even in many of the insane (doubtless not among the violent and delirious insane, who are the only ones to haunt the imagination of classical criminologists, but in the larger class of insane whose consciousness is not suppressed) the idea of crime, for example homicide and robbery, is the same as in the criminal who is not insane: they may have consciousness that they are committing a prohibited act and yet according to this eclectic theory they would not be responsible.[4]

[1] *Kleinschrod*, "Doctrine of the Imputation of Crimes," in "Scritti germanici di diritto criminale (Naples, 1846), I, 16, and "The Essence and Punishment of the Guilty Criminal," *ibid.* I, 85. See in special relation to fraud and deceit, *Franck*, "Verstellung und Wille in der modernen Doluslehre," in Z. G. S. (1890), X, 2.

[2] *Poletti*, "La persona giuridica nella scienza del diritto penale" (Udine, 1886).

[3] For this fundamental psychological characteristic of the delinquent, see *Ferri*, "Omicidio," pp. 528 *et seq.*

[4] *Conti*, "Della imputabilità," in *Cogliolo*, "Trattato di diritto penale" (Milan, 1890), fasc. 65, p. 19. "We believe that every man living in society, who meditates and does an act against the law, while in normal psychic and intellectual condition, is responsible therefor." And *Vida*, "De la imputabilidad," in the "Revista de antropologia criminal" (February, 1889), p. 82, "For penal law to consider an act imputable, it is enough for it to have been executed with consciousness and reflection by a man, who knew what he was doing." And *Laurent*, "Des habitués des prisons de Paris," p. 600, "To be responsible, the delinquent need not understand what evil is, it is enough if he can distinguish between what is allowed and what is forbidden by the laws of his country."

How, indeed, is one to establish in practice whether the intelligence is normal or not? Are these traditional and in some sort regulating circumstances of tender infancy, insanity, sleep, drunkenness, or of the congenital deaf mute the only ones that deprive a man of his normal intelligence? And in estimating responsibility, how is the want of training and education to be calculated, or that rusticity that was sufficient in the practical sense of the Romans to exempt an accused from the absurd assumption that every one knows the law? The vague extenuating circumstances customarily received are in this case, also, only an anti-scientific expedient to soften the glaring contrast between moral responsibility and the state of intelligence in many criminals, who, while not pathological, are not normal by any means.

Finally, this theory carries us back to the old Cartesian and Rosminian psychology of separate faculties of the mind and hence, of an intelligence distinct from the will. There remains always the insurmountable objection to all of the eclectic theories that responsibility and hence defense of society vanish or diminish just where it is most necessary, namely in the case of criminals whose intelligence is abnormal and who are on that account the most dangerous.

§ 258. Eclectic Theories of Responsibility: Voluntarianism.

Now that the various eclectic theories, which nevertheless always rest on one or the other of the two traditional elements of responsibility — liberty and intelligence — have been rejected, emasculated, modified, or reduced to a minimum, more theories are offered us that are also eclectic and, I may say sporadic, since they spring up here and there. They are brought forth by the imagination of some thinker, who does not see that, with the suppression of the old idea of moral responsibility, there is no other sure and positive road except to adhere to the idea of social accountability, but who goes about searching in the scraps for more or less ingenious criteria, all of which are incapable of meeting the theoretical and practical needs of a doctrine of social defense against crime.

Principally, in the drafting of penal codes there has spontaneously appeared another expedient to avoid the ever-increasing difficulties on the subject of free will as the foundation of moral and penal responsibility. It has been said: Admitting that free choice and liberty may be disputed, the will still

subsists with or without liberty, and on its account man is materially and morally accountable for his crimes because they are precisely the external manifestation and effect of this will which represents all that is most intimate and most personal in the individual agent. The convenience of this is that in merely pronouncing the word "will" no offense is given to either side.

The denial of free choice as an inherent quality of will is not a denial of will itself in so far as it is determined by external and internal causes: and, on the other hand, the believer in free choice will be satisfied with the mere word "will" because he considers liberty as an inseparable quality of the will like weight in matter. As early as the first draft of the Penal Code for the Kingdom of Italy in 1806–1808 moral responsibility was based explicitly on the intervention only of the will. The same is true of the Italian Code in force since 1889, of the Spanish Code of 1890 and of the Austrian Code of 1852, which, however, (like that of Zurich) speaks in Article I of malicious intent (direct or indirect) rather than of voluntariness. The Code of Zurich and the Hungarian Code, wrongly quoted as legislative precedents by the Italian legislator, do not in fact mention either will or voluntariness, but only "dolus" and "culpa," and I shall presently show how different that is. The draft of the Russian Penal Code (1883), the Swiss Draft (edited by Stooss and modified by a special commission), and the Bulgarian Code (1896) give the will as the condition of punishability. There are not, to my knowledge any other codes containing this preliminary disposition on imputability or punishability; far from it, they all begin by determining the general condition of non-imputability or non-punishability by some one of these famous formulae, such as "weakness of mind"—"privation of intelligence"—"diseased impairment of the mental faculties"—"unconsciousness"—"lack of consciousness" (in the criminal) of his own act and the crime he commits — "duress" either in the acts or the determination — "irresistible force," exterior or interior, etc., which have fatigued many generations of code draughtsmen, condemning them to a sterile and pitiable labor of formulae and quibbles. These formulae themselves prove their kaleidoscopic variety, the logical instability, and scientific inconsistency of the classical theory of moral responsibility, a responsibility ever founded on and measured by liberty and intelligence and ever given the lie by the data of psychology and criminal psychopathology.

Let us examine the value of this voluntariness that is so convenient for the eclectics and wherein the legislators of so many nations have sought to avoid the reef of the former free choice. With voluntariness, there is always the assumption that moral responsibility is the condition and measure of penal accountability; hence, neither the absurdities nor the dangers, pointed out in the other eclectic theories, are avoided: on the contrary new ones are added. The criterion of voluntariness as the base of moral responsibility is an error from the psychological and juridical point of view, and in practice it is equivocal and uncertain. The psychological element of the crime (which naturally also has its value in the theory of social responsibility,[1] in determining the conditions of the act and of the agent to whom are to be applied the corresponding reaction of society) is not constituted by voluntariness alone: it embraces also the intention and the purpose.

Voluntariness relates to the act by itself. The firing of a gun may have been intentional or accidental: a certain word in a newspaper article may have been intentional or it may have been a typographical error. Intention relates to the motive for which the act has been willed. Was the gun fired to kill, to wound, to frighten, or only to make a noise? Was the defamatory word written to vilify some one or to reveal the truth? Purpose relates to the effect which is sought to be obtained in willing to accomplish a given act with a given intention. A gun has been fired to kill; but was the purpose to avenge an insult, to obtain property, to rob, or in self-defense? The defamatory word has been used to reveal the truth: but was there a selfish purpose, for example, to eliminate a competitor to wound some one, or to get notoriety? — or was it proposed to serve society by public censure of rascals who fraudulently assume the reputation of honest men? That there may be penal accountability three elements are requisite. It is not sufficient that the act has been willed, there must also have been the intention to injure the right of another, together with an anti-social and anti-juridical purpose.[2] This is expressed less com-

[1] Chap. VI, VIII, *post.*

[2] It is only through this analysis of the psychological element in crimes that a scientific doctrine of malice can be constructed. Thus, when *Garcon*, "Projet du code pénal russe," in the "Revue pénitentiaire" (1896), p. 710, said that "the theory of intent in criminal law is still to be made" he was right, if he thought of the classical school, but less accurate in regard to the positivists.

pletely and less clearly by some jurists and legislators when they say that the psychological element of crime is constituted by "dolus," or by perversity of intention, or by malice, or again, when they establish the rule that there must be beyond the general "dolus," a specific "dolus." It is hence a psychological error to say that an act is punishable because it is voluntary. Frequently the code (for example in defamation, concealing criminals, abandonment of children, and assisting suicide) punishes the mere act provided it be voluntary without considering the intention of the agent or the purpose he had in view. This is unjust and improvident because if it is important to punish one who is guilty of a malevolent defamation with a view to an anti-social purpose, or the concealer who seeks a dishonest gain or wishes to insult authority, or the person who abandons an infant to cause it to perish or disappear, or who incites or aids another in self-destruction to obtain property or exercise vengeance and in similar cases; — on the contrary one should not punish the defamer who tells the truth in order to serve the public nor the harborer who obeys a sentiment of pity or even the desire to assist the discovery and proof of a crime, nor the one who abandons a child under stress of poverty and in such a way that either individuals or the public take charge of the waif, nor the one who aids in the suicide of another under the mere impulse of humanity. They all do a voluntary act, but with intentions and purposes so different that in the one case the act is anti-social and anti-juridical but in the other it is not. It must therefore determine a defensive reaction of society in one case and not in the other. This alleged voluntariness is also a juridical error. By what right would you punish those crimes of omission in which it cannot be maintained that the negligence and forgetfulness have anything voluntary in them? Moreover, it can be maintained, even in cases of positive action, that negligence is a defect of the will rather than of the intelligence. It is well known that the classical school which bases moral and penal responsibility on the intelligence and free will of the individual has always gone upon the rocks in the justification of the punishability of unpremeditated and involuntary crimes. The presumption of "dolus" (Carmignani), punishability by exception (Mori), by correction, etc., have been thought of; but the true reason is that given by Carrara — "social necessity"; and this is a positivistic reason in harmony with our conception of social accountability but not in

harmony with the classical theory of moral freedom. Indeed, it is natural that we should maintain that non-premeditated acts are punishable (except as to the form to be given the social sanction), exactly like any other crime and for the sole reason that they are anti-social, irrespective of the moral responsibility (by free will or by normal intelligence) of the agent. Consequently, on account of all the absurdities and dangers that it has in common with all the other eclectic theories and formulas, and on account, also, of the fundamental psychological and juridical errors peculiar to it, this eclectic theory of voluntariness again proves that a decision must be made between free choice and determinism and moral responsibility and social accountability. Otherwise the thought of the legislator, remaining undecided and vague in the shadows of a barren eclecticism, may perhaps, give us a comforting indication of the inevitable transitions preparatory to the triumph of the positivist theories but deprive practical penal justice of all clearness and precision and leave it none of those sure criteria which alone permit the law with beneficent providence to descend from the domain of theoretical abstractions to the living, palpitating reality of human acts.

§ 259. Eclectic Theories of Responsibility: Intimidability.

Another eclectic theory, designed to conciliate the new data of scientific physio-psychology with the ancient moral responsibility of the criminal, has been advanced by Dubuisson, copied by Impallomeni and later by several other eclectic criminalists. Dubuisson, who is a physician, not a jurist, said: "Man is responsible for his acts, even when he has received by heredity intellectual and moral dispositions which necessarily impel him in a given direction . . . because man, whether born perverse, or perverted by a vicious education, is not by that fact alone drawn to evil without possibility of resistance, and hence is not irresponsible. . . . Ill endowed as he may be, he is only a more or less unfortunate variety of the species, but nevertheless his intellectual and moral functions operate in a normal way. . . ! It is true that certain individuals, idiots, for example, are born with so miserable an endowment from the intellectual point of view that they cannot rise even to the notion of good and evil. But all perverts are not idiots and it is error to think that simply because a man is badly constituted from the moral point of view *i. e.* from the point of view of his tendencies, that it should be

impossible for him to have a sufficiently precise conception of what is moral or immoral, lawful or unlawful. It is one thing to distinguish good from evil, a purely intellectual operation, and quite another thing to feel impelled to good or evil, a purely moral phenomenon. The sane individual may comprehend the good and yet do the evil. . . . It is a question now of showing that it is not impossible for this man who was born unfortunate, and whom environment and education may have perverted still more, to resist his tendencies and that he may consequently be considered responsible. . . . We are confronted by an individual morally incapable of self-control, of an individual rebellious to all the suggestions of a higher order. What is there left in him to counterbalance the evil tendencies that rule his brain? Nothing outside of these very tendencies and that would in truth be very little if there were no penal repression. It is penal repression which comes to the aid of this unfortunate. Cupidity, sexual passion, the instinct of destruction seek satisfaction; but intelligence shows this man that such satisfactions will bring about castigation through his property, his liberty, his life, *i. e.* in the very instincts that he is burning to satisfy; and it then happens (provided of course that the intimidation be sufficient) that these evil tendencies operating in a contrary direction hold themselves in balance and are neutralized. Man, according to the fatalists, should not be punished because he is unable to resist his tendencies.

According to us man is capable of resisting his tendencies exactly because he may be punished, because punishment exists. Without punishment, which is intimidation, the perverted being would be without refuge against his perversity and could not do otherwise than yield to it. . . . This is why I have laid down the general rule, without concerning myself with exceptions (all embraced in mental alienation) that, as all men are capable of intimidation, they must be considered as responsible for their acts."[1] There is no need to pause for any length of time to show the inanity of this new eclectic tentative. Punishment, as Beccaria[2] said, is a "sensible motive opposed to crime," and hence, "psychological coercion" is, as Feuerbach said, one of the reasons and one of the offices of punishment, and clearly can be reconciled with psychological determinism but not with the hypothesis of the free choice. The power to direct man by means

[1] *Dubuisson*, "Théorie de la responsabilité."
[2] *Beccaria*, "Dei delitti e delle pene," § 2.

of penal laws, of which Carmignani speaks also, becomes nonsense when it is reduced to a gambling chance by admitting free choice. As Clémence Royer said at the second Congress of Criminal Anthropology, "Whatever form it may have taken under the influence of false beliefs and the vagaries of human imagination, juridical punishment can have no other object than to change the resultant of the motives of action; so that in most, if not all cases, fear of punishment in the individual tempted to commit a harmful act modifies the direction of this resultant, giving it a negative in place of a positive sign." [1] Saying (as is repeatedly said in this book) that one of the offices and functions of the penalty established by the legislator, applied by the judge, and executed by the administrative power, is (within the limits of the very slight real efficacy of penalties) psychological coercion or, as Romagnosi put it, the counter-impulsion to the criminal impulse — is quite a different thing from saying with Dubuisson that the intimidability of man is the foundation of his moral and penal responsibility. First of all, when a man commits a crime he commits it precisely because he has not been intimidated and because, in the exact conditions in which he was placed in acting, he could not be intimidated by punishment.

The logical conclusion of this theory would be that there are no persons responsible except those who do not commit crimes. Even disregarding all that is psychologically false and illogical in the assumption that man in all his acts is subject to the determinism of heredity and environment, and in the belief that in spite of it he is capable of resisting this very determination of heredity and environment when about to commit crime; even disregarding all that I have said heretofore on the psychology of punishment; even failing to notice that ordinarily this theory in contemplating an abstract type of criminal forgets or ignores that in all criminals (sometimes more, sometimes less), in every category, there is found an exceptional want of foresight; it is still singularly naïve to declare that "the evil tendencies operating in a contrary direction establish their own equilibrium, provided that the intimidation be sufficient." Do we not see criminals for whom the menace even of the death penalty is not sufficient to prevent the commission of crime? This is precisely because intimidation is sufficient — only for those who do not commit crime, and these only, I repeat, would be responsible. Doubtless the theory of psychological coercion

[1] "Actes du 2ème congrès" (Paris, 1890), p. 360.

given as the reason for the social right to punish may answer this objection in the words of Bauer, "that there is no sort of laws which realize their object fully and adequately"; but that does not mean that the whole legislation is an institution that does not correspond to its object. The complete suppression of crimes is an ideal perfection that is unattainable. But this only proves that the penal law also shares in the imperfection which is characteristic of all human institutions. The penal menace remains none the less an efficacious means in most cases and hence corresponds to the object it seeks to attain. "Just as a physician will not cease to use a medicine which he has often employed with salutary results simply because it has not been efficacious in certain cases, so also a legislator will not cease to menace illicit actions with penalties, although experience has taught him that these menaces are insufficient to prevent all transgressions."[1] When intimidation, instead of being assumed as an office of the social function of defense (which we do not at all admit, since in the preservative clinic of crime intimidation is one of the effects of the means employed just as it is for insane persons in asylums, but it is neither the object nor the justifying principle of the function itself) — when intimidation, I say, is offered to us as the foundation of individual responsibility, evidently all the individual cases where crime is committed would be all cases of irresponsibility, simply because the criminal in the internal and extern alcircumstances surrounding him at the time of the commission was not intimidable. It is just the same as if one were to reason in an abstract way on the instinct of self-preservation in cases of suicide. While it is true that this instinct is present in those who do not commit suicide, it does not exist in the suicide at the moment of self-destruction. Vice versa, a mass of individuals who, according to Dubuisson and his followers, should be irresponsible (by reason of mental alienation) would in fact according to his theory be really responsible. It is well known that the greater part of the insane may be governed and intimidated by the same psychological means of rewards and punishments which serve that purpose with the sane.[2]

[1] *Bauer*, "Tentativo di una rettificazione della teoria della coazione psicologica," in the "Scritti germanici di Mori," Naples, 1846, II, 9.

[2] The imaginary characteristics of the insane, on the contrary, which those ignorant of psychiatry, criminalists or not, imagine when they speak of insane delinquents, are always those which the great criminologist Niccolini painted in these words: "Insanity in law is that which completely obscures and destroys the

There are, however, among the insane, honest folk and criminals, according as their malady attacks or respects their social sense; and I have always observed in the asylums where they are treated that, for example, the homicidal insane have the clean-cut characteristics of the murderer's physiognomy (enormous jaws, glassy eyes, thin lips) just like born murderers who are not insane. At all events, the regular, quiet, and laborious life of the asylum for the criminal insane [1] is a daily proof that the majority of madmen (save the rare exceptions of violent and furious madmen) can be intimidated and disciplined by threat of punishment. This has been recently well pointed out by the alienist De Mattos among others: "When an individual discontinues the performance of an act to which he himself feels inclined, because he fears punishment, or when induced by the hope of reward he performs an act which without this stimulus he would have tried to shirk, he is responsible. In this sense the insane are responsible; for experience proves every day that they are able to modify their conduct in view of punishment or reward. More or less severe reprimands, confinement in a cell, deprivation of the hours of recreation, increase of labor, on the one hand, and, on the other, praise, a show of affection, an increase of money, the grant of more liberty, are the disciplinary means successfully employed in practice in controlling some of the insane. In some asylums this idea has been carried so far, and I think with advantage, as to give the insane a percentage on the product of their labor. Another proof of the existence of moral responsibility among some of the insane is in the well-known fact that they often try to conceal their delusion (fixed idea) in order to procure their liberty. These

memory of past sensation, so that all knowledge of natural relations between things disappears; it is that which makes present impressions become organic reactions rather than sensations; that, in a word, which either deprives a man of all knowledge, sensation, and of being the same that he always has been, or else it leaves some glow of this consciousness, but unties and loosens the bonds between the ideas, so that the man no longer understands or recognizes his own entity." See also *Maiorfi*, "Concetto scientifico e volgare della pazzia" (Florence, 1883).

This is why the English nobleman, of whom Maudsley speaks, when leaving an insane asylum, asked where the insane were. The general belief (and many criminologists entertain it) represents the insane as beings entirely without the scope of humanity (such as the born-criminal is still considered), and this is the reason that before the courts as well as in the insane asylums and prisons, the moment that the insane in the criminals are seen to resemble normal humanity and their abnormalities are not as visible as two heads or three eyes, the ignorant or less cultured create the obscurities and errors in the theories of the positivist school which exist only in their own brains.

[1] *Saccozzi*, "L'idea della pena nei pazzi criminali."

insane persons conceal with great care and rare cunning every manifestation of insanity, since they understand that it is because they reveal senseless ideas and do senseless acts that they are restrained in an odious prison. It takes a practised eye to recognize those who simulate madness, and it takes a no less practised eye to distinguish those who simulate sanity." [1]

The logical conclusion of this eclectic theory would therefore be as follows: Since the greater part of the insane are intimidable, the insane are on that account morally responsible. This is just the contrary of what Dubuisson and the others seek to establish in making it a point to distinguish the responsible delinquent from those who are irresponsible by reason of mental alienation.[2] By way of conclusion, let us say that a last objection can be made to this miserable attempt to harmonize bio-physiological determinism with moral responsibility, namely, that it would be impossible to justify by intimidability involuntary or non-premeditated crimes. Where there is ignorance of the law as when an individual commits a crime or contravention without knowing that the act is forbidden by law, one can even understand how this excuse is admissible (although unjustly if made a general rule) by those who say that man is responsible because he acts with freedom, intelligence, or voluntarily. But for those who

[1] *De Mattos*, "La pazzia." See also *Beard*, *Elwel*, *Seguin*, *Jewell*, *Jolsoom*, "The Moral Responsibility of the Insane," in the "North American Review" (January, 1882); *Mercier*, "Sanity and Insanity" (London, 1890), Chap. IV; *Jelgersma*, "L'origine pathologique du caractère du criminel né."

[2] This idea of intimidability as the reason of imputability was, as I have said, implicitly contained in the theories of Carmignani (dirigibility of human action), and of Feuerbach (psychological coercion), and above all, of *Romagnosi*, "Genesi del diritto penale," §§ 340, 461.

It is also implicitly indicated in the special sense which Dubuisson gives to this theory of *Poletti*, "Del sentimento nella scienza del diritto penale." Before Dubuisson and his followers this idea was clearly indicated by *Bain*, "Mind and Body," and by *Piperno*, "La nuova scuola criminale in Italia" (Rome, 1886), p. 93, and by *Lévy-Bruhl*, "Idée de responsabilité," pp. 4350, 198, who says, "All that the law requires to make a man responsible is that he can understand the punishment with which the law threatens certain acts, and abstain from these acts because of the punishment. Every one, therefore, like the insane, is irresponsible if he is incapable of this reflection or is subject to morbid impulses which he cannot repress. This is a clear, precise distinction." Now, the truth is entirely different, except in the cases where it deals with the violent insane, the idiots, or diseases of the will. But except in these cases, which are very unusual even among the idiots, all the other insane are, on the contrary, capable of reflecting upon the consequences of their acts, and consequently it is only through ignorance that such an objection as "can fear of punishment control the insane" can be made. *Proal*, "Déterminisme et pénalité," A. C. A. C. (July, 1891), p. 377, and "Le crime *et* la peine," p. 387.

assert that man is responsible because intimidable, how is the responsibility to be maintained in a case where it is absurd to speak of intimidability since the delinquent is not aware of the legal prohibition nor consequently of the penalty? Moreover, in involuntary and unpremeditated crimes, if man has neither moral nor the consequent penal responsibility except for the fact that he can and should take into account with the motives of his action the threat of punishment "in so far as it operates as a motive present in the consciousness of the wrongdoer," how can one be held punishable who has acted from mere improvidence, or who, by omission and negligence, has not acted at all and hence has neither willed the harmful effect nor thought of the penalty?

When one reasons abstractly on an algebraic type of criminal non-existent in real life, or deduces from a small number of diagrammatic and particularly striking cases, rules, which consequently do not apply to the more common but not less real cases, it is easy to say that man weighs deliberately a murder to be committed and that he can and should have present in his consciousness the penalty which menaces such a crime. No eclecticism, elastic as it may be, will ever succeed in satisfactorily proving that we should hold responsible, because intimidable, a man who has committed or caused a homicide without willing it and without even thinking of the homicide itself or a portion of the penalty with which he is threatened. The superannuated idea of intimidability as the reason for responsibility and of intimidation as the purpose of punishment, an idea that the eclectics to-day try to reassert, always has experience and history against it, for they have shown that "psychological coercion" inevitably leads to a continual increase of penal rigor, deflecting the thought of the legislator from social reforms, directing it, as is only too easy, to the aggravation of penalties and punishments, while criminality does not cease to be an obstinate daily phenomenon. This theory, which had all the sympathy of so delicate a soul as Muyart de Vouglans, is in reality anti-human and reactionary, since it tries to reproduce a barbarous phase of penal justice.[1] So true is this that whereas we think that the pain of the condemned is admissible neither as object nor as

[1] See for example the laws of Manu cited by *Durckheim*, "Divison du travail social," p. 151, "To aid kings in their functions, the Lord created from the beginning chastisement. Chastisement controls mankind; chastisement protects mankind; chastisement watches while men sleep; chastisement is justice."

means in penal justice, and whereas we substitute for it as object social conservation, and as means the preventive cure of the environment and the individual clinic of the convict,— the eclectic adherents of the principle of intimidation declare that this principle, "without leading us back to the cruelties of the Middle Ages, certainly requires that penalties shall have a certain severity." [1] This severity, in consequence of inevitable abuses, will lead to real tortures, which penalties, indeed, are even to-day beginning with the cellular systems, as we shall see. It is useless to reply that practical abuses occur with every principle, as with the principle of vengeance and expiation.[2] Evidently these inevitable abuses which they have in common, show nothing more than that these principles belong to the instructive and barbarous phases of penal justice.

In the principle of intimidation, especially, the tendency to increase in severity is a logical and therefore inseparable consequence of the principle itself, much more so than in the principle of vengeance, legal retribution, or any other. Of itself the spirit of vengeance may lead to a like tendency and carry the sufferings of convicts to excess; in vengeance, resentment and hatred exaggerate the penalty; but in intimidation it is the over-logical reasoning that if the penalties inflicted have been insufficient to prevent past crimes, they should be aggravated in the illusory hope that they will thus become an efficacious remedy against future crimes. If, on the contrary, penal justice be considered as a clinic designed to combat a social and individual malady, abuses are reduced to isolated cases and increasingly rare exceptions. Formerly when the insane were hated, despised, and punished, the excess of torment inflicted upon them was an inevitable consequence that disappeared with the recognition that the insane were simply more or less dangerous sick persons in need of treatment. It will be the same in the treatment of criminals. Suffering will be restricted to the limits of therapeutic necessity. Excesses in the severity of punishment will no longer have a reason for existence, whereas excesses cannot fail to be continually stimulated by the illusory and antisocial principle of intimidation.

[1] *Lanza*, "Fondamento razionale e fini della pena," Introd. in the "Foro penale" (August, 1899), p. 192, a reproduction of a chapter in his "Trattato di diritto penale" (Bologna, 1895), P. I, pp. 500 *et seq.*

[2] *Cuche*, "L'avenir de l'intimidation," in the "Revue pénitentiaire" (June, 1894), p. 386.

§ 260. Eclectic Theories of Responsibility: Normality — Poletti.

Poletti, who indeed understood even before the positivist school the scientific weakness of the classical penal theories, but who did not consider it necessary to go as far as the logical conclusions of the new theories, particularly the idea of social accountability, thought that the basis of responsibility in criminals is to be found in what he calls "normal action." He had already in an earlier essay indicated this theory in giving an unwarranted extension to an idea of Drill. Drill, indeed, had said "that it was necessary in fixing a starting point, to establish the type of the normal social man, a type which must vary with society and which represents the man capable of living an independent life in a given society. It is difficult to determine this type; but in every society there is a minimum of its realization — a minimum below which a man is no longer adapted to the life in common. Children, aged persons, whose minds are weakened, criminals, the insane, do not reach the minimum: these individuals serve to prove that, given the same exterior conditions, men are not all capable by reason of their psycho-physical constitution of acting as the typical man would act." [1]

Drill, who is one of the most illustrious representatives of the positivist school among the Russians, does not at all give the minimum of normality as the reason for responsibility, since he speaks at the same time of children, the aged, criminals and the insane. He has only noted the positivistic fact that the conditions of social coexistence impose on every individual a minimum of adaptation to given conditions, under penalty of separation from society for those who do not measure up to it. Poletti understood this idea to be that "the author of a crime in order to be responsible for the criminal action must present in his person at least the minimum of that state which science deems necessary to constitute a normal man." This is obviously quite a different idea and has a quite different extension.[2] In a later essay on normal action as the base of the responsibility

[1] "Les jeunes criminels, étude sur la question de la délinquence considérée dans ses facteurs et dans les moyens de la combattre" (in Russian Moscow, 1884); "Criminels mineurs, psychologie générale de la criminalité" (Moscow, 1888); "Types psycho-physiques, psychologie spéciale de la criminalité" (Moscow, 1890). Résumé of *Lombroso and Morro*, "Sugli ultimi studi di antropologia criminale in Europa," R. C. (1885), p. 397; of *Frankel*, A. C. A. C. (15 January, 1891).

[2] *Poletti*, "La persona giuridica nella scienza del diritto penale," pp. 145, 146.

of delinquents,[1] he developed the idea that "only the normal man can become delinquent and, hence, responsible for crime, inasmuch as the foundation of his responsibility is found in the internal systematization and extrinsic evolution of normal action." And for this reason he maintains that not only the insane but even criminals by congenital tendency and recidivists, "whose rehabilitation should be put under the head of a sentimental illusion" cannot be responsible, since they are not normal men. Poletti certainly does not dispute that society must defend itself against insane criminals, criminals by birth, and recidivists, but he does insist on the habitual idea, so often refuted, that in their case there is no question of a true punishment, but only of politico-social measures of preservation, since only normal men are responsible for their crimes and, hence, punishable. In any event, the logical consequence of this eclectic theory of the irresponsibility of not only insane criminals but also of criminals by congenital tendency and habitual criminals (the most dangerous), is sufficient for a judgment of the theory itself. There are, however, other considerations against it, which demonstrate its evident insufficiency. Since not only Poletti but others also, Gabelli, Fulci, Tarde, Joly, Dortel, Thierry, Riant, Liszt, and Maus, to mention the more recent, without confining themselves to the traditional theories of the classical school, nevertheless insist upon the alleged distinction between normal and abnormal criminals, it may be well to recall a significant historical precedent.[2] When, after some studies in positivist psychology, I began to occupy myself with criminal anthropology, the idea which spontaneously came to my mind was this: "The anthropologico-criminal theories of criminal man revealed by Lombroso do not reach the basis of punitive law and criminal science, because the field of action is different. In other words, in the mass of criminals, there are those who are such through a defect in their constitutional organism and their education, which inevitably must induce a criminal life without possibility of correction: and there are also habitual criminals, incorrigible only because of an abnormal organic development, who cannot be satisfied with the common lot." [3] This "act o finium regun-

[1] *Poletti*, "Normal action as the base of the responsibility of deliquents." (Udine 1889) pp. 143, 122, and 133.

[2] *Ferri*, "Polemica in difesa della scuola criminale positiva," pp. 117 *et seq.*

[3] "Teoria della imputabilità," p. 477, 8.

dorum," as Fioretti ingeniously calls it, has been fully developed by me in the monograph on the "Boundaries between penal law and criminal anthropology," [1] where, in giving for the first time the classification of criminals in five categories I finished with "a positivist conciliation between criminal anthropology and law. The former being turned back to its natural limits, that is, the study of the criminal insane and of those born incorrigible or become such by habit, while criminal law, although guided by a method and by criteria differing in part from those in vogue hitherto, retains as its free and exclusive domain the occasional criminal." [2] This was evidently a middle term, a compromise between the old ideas and the new, just as in "La teoria dell' imputabilità," while rejecting the criterion of the free choice, I stopped at the criterion of normal intelligence. Nevertheless, my thought was not long in accomplishing its whole evolution and gradually advanced as far as the idea of social accountability and the inclusion of the five categories of criminals among the attributions of defense of society, or criminal sociology.[3]

§ 261. Criticism of the Theory of Poletti.

In fact, in 1883 I wrote: "While in my 'Nuovi Orizzonti' (1st edition) I said that certain classes of delinquents were without the bounds of criminal law and must be considered only by criminal anthropologists and treated with measures foreign to legal criteria, I have since renounced this theory as inaccurate, because criminal anthropology is considered by the positive method as an

[1] S. P. (31 August, 1891).

[2] A. P. (1880), I, 444, and "Nuovi Orizzonti," 1st ed., p. 52.

[3] I like to compare the gradual evolution of my scientific thought reaching in the field of criminology from premises of fact to logical and radical consequences, with another gradual evolution made by my thought in the sociological field, when (in 1892 to 1903 after the first edition of this book) giving myself over to a deep study of Marxist doctrines, I reached this radical conclusion, "Sociology must be socialistic."

Because of political opposition, this last evolution which I effected, always progressive and never inverse, like that of many of my critics and adversaries, such as Garafalo and Colajanni, has aroused great discussion and criticism. But it gives a new proof that my scientific feeling, in place of advancing through sudden impressions, develops gradually by a study of facts, just as (and this is still another proof) in 1897, when I subjected sociologico-criminal doctrines to a new examination in the light of Marxist sociology through a gradual evolution, I completed my thought on penal justice as the instrument of class defense (and not only of social defense), as I explained in my "Justice pénale," and as I have developed more systematically in the 4th Italian edition, Section 53, and the 2d French edition, Section 53.

integral part of criminal law. In fact all means of defense against every kind of delinquent are part of criminal law." [1] Thus, I frankly overrule the theory which I first followed, and believe that its scientific barriers, as Turati calls them, are arbitrary and irrational. For, as we now look upon punishment (in conformity with the positivistic doctrine) as an act of social defense against the authors of anti-social acts, the reason why society reacts in self-defense, for example, against the occasional murderer, must be the same as that which causes it to react in self-defense against the murderer prompted by insanity or congenital tendency; of course, the form of defensive reaction must fit particular conditions of the agents and the acts. Consequently, the idea of Poletti that only a normal man can be made responsible for crime, cannot be accepted. Similarly, the essential (and not merely formal) distinction advanced between the confinement of the occasional delinquent in a prison and that of an insane delinquent in a madhouse disappears, for it is based on an eclectic conciliation between the old and the new, which doubtless exists, but which is both insufficient and untrue. But besides these indirect reasons why the idea of normality is inacceptable as a basis of responsibility because of the practical consequences which it entails and the psychological origin from which it is derived, there are other and weightier objections. First, as Clémence Royer said, "The normal being constituted according to the mesne type of the species is no more morally responsible for his acts from a psychical or physical point of view than the abnormal man. A human being is no more responsible for his virtues than his vices. It is not his efforts that make him a Saint Vincent de Paul rather than Lacenaire, Regulus rather than Catiline." [2] But above all other objections there is one which cannot be overcome, that is, that the positive data of criminal bio-psychology absolutely disprove the idea of a normal delinquent. A truly normal man does not commit crime: a crime always shows abnormality, either congenital or acquired, permanent or transitory. An insane criminal, like the born or habitual criminal, commits crime because he lacks moral or social sense, either from birth or by subsequent degeneration. An occasional criminal is not totally lacking in social sense, but it is feeble and incapable of resisting internal and external anti-social influences. Neither does a criminal through passion lack it, but

[1] "La scuola positiva di diritto criminale" (Sienna, 1883), p. 35.
[2] "Actes du 2ème congrès" (Paris, 1890), p. 357.

it is momentarily paralyzed by the slow or sudden attack of a passion which will excuse him if it is social, that is to say, moral, such as honor, love, or self-preservation; but which will not excuse him if anti-social or immoral, such as cupidity, vengeance, hate, or lust. Just as will does not make the fool, so will does not make the criminal. We cannot say, therefore, that only the normal criminal is responsible, because this phrase connotes a psychological impossibility and contains a contradiction in terms; — burning ice or shady sun are not more illogical phrases. In the last place, a final objection can be made to Poletti's theory similar to that which we have already made to Gabelli. There is no line of demarcation between crime and insanity. Nature does not advance by leaps, but gradually. It is we who speak of abrupt demarcations where there is only a gradual passion and a series of shaded changes from one state to another. The "intermediate zone" of Maudsley, the acceptance of which alone shows that it is impossible to separate morally responsible delinquents from those who are morally irresponsible, does not lie only between insanity and crime, but also between normality and abnormality. How can one determine whether non-typical delinquents, intermediaries between one type and the other, are normal or not? Poletti saw this weak point in his theory, and in order to overcome it, wrote, "It is possible to determine the minimum of normality, although every one knows that we will always be able in practice and in any particular case to argue about normality, and where it ceases."[1] "This line of separation is absolutely ideal, for there are no certain limits between normal and abnormal action; there are only steps which show the change from one to the other without ever letting us see with any certainty the point where the change occurs."[2] How can we have a scientific theory which is so evidently incapable of practical application to the daily needs of social protection?

§ 262. Criticism of the Theory of Liszt.

These critical observations which we have made of the theory of normality are so true that recently Liszt, who had remained undecided between the old and the new ideas, and who in an address to the Psychological Congress at Munich, in August, 1896, still insisted on a distinction between normal and abnormal,

[1] *Poletti*, "La persona giuridica nella scienza del diritto penale," p. 145.
[2] *Poletti*, "L'azione normale" (Udine, 1889), p. 93.

making psychical normality the basis of responsibility of the delinquent, has finally, in his polemic against the criticisms of this theory, which is Poletti's rather than his own, declared explicitly that all demarcation between the normal and the abnormal, the responsible and the irresponsible, the insane and the criminal, and, consequently, between punishment and measures of security, is absolutely impossible.[1]

But Liszt still remains in the hazy zone of eclecticism; having declared, and repeatedly, that the superannuated antithesis between punishment and measures of preservation must be abandoned, he continues in the belief that a relative criterion of imputability can be found in the normal determinability of motives. All the objections to the theory of Poletti just stated are applicable to this opinion. His obstinacy is in vain. We must have the scientific courage to accept all the logical consequences of natural determinism. From the moment that we cease to consider crime as the fiat of free will, but look upon it as the product and pathological symptom of individual and social anomalies, every criminal, insane and sane, is morally irresponsible, although all must answer to society for their anti-social acts. Consequently, there is no distinction to be made between morally responsible and irresponsible delinquents, between punishment and measures of protection. There are no different forms based on different criteria for the same function of preservative measures, as I will show in the next few pages. No longer in our hospitals and insane asylums do we distinguish whether the disease was caused by vice, imprudence, or chance. We are content to fit the treatment to the state of the patient and the nature of his disease.

§ 263. The Eclecticism of Tarde.

Of all the eclectic theories of responsibility the most original is that developed by Tarde, not a creative genius but a close critic and an ingenious weaver of more or less positive ideas. He has developed recently a latent spiritualism which is hard to reconcile with his first publications. Even in his "Criminalité comparée," on the subject of hypnotic suggestions and responsibility,

[1] *Liszt*, "Die strafrechtliche Zurechnungsfähigkeit" (1896), XVII, 75, 76. Liszt again, and more specifically, insisted this impossibility after the criticism of *Fornitsky*, A. C. A. C. (Geneva, 1897), p. 305, when I said (p. 307) that the "Normal determinability of Liszt was only a reproduction of an idea of Poletti, criticised in my third edition (1892), p. 229.

he showed signs of the theory which he has since developed in his report on the old and new basis of moral responsibility for the Second International Congress of Criminal Anthropology, and which he has further developed in his "Penal Philosophy." [1] It is impossible here to quote from Tarde, because he habitually indulges in a mass of embroideries and arabesques and prolix secondary ideas; but his theory can be outlined as follows: moral responsibility is not necessarily bound up with the existence of free will (denied by Tarde), but it is, nevertheless, the indispensable condition and measure of criminal responsibility, which, however, is founded on other criteria and other elements. These are personal identity of the delinquent with himself before and after the commission of the crime, and his social similarity to those among whom he lives and acts and by whom he must be punished. If either of these conditions is lacking, the individual is not morally responsible for the crimes which he commits, although society may take precautionary action against him of an administrative and non-penal character. Thus cases of irresponsibility are found side by side with those of moral responsibility. They are insanity, drunkenness, atavism, senility, moral perversion and duress. Tarde, in reply to the able criticisms of his theory made by Ciccarelli in the name of positivism, denies that it is inspired by eclecticism "for it is connected," he says, "to a whole system of ideas which I myself have developed and which have nothing in common with an amalgam of incoherent ideas." [2] Without questioning, however, that this theory answers in Tarde's mind to a sum of ideas which are his own (imitation or invention), it is none the less true that this sum is to a large extent eclectic with a greater or less tendency toward socialism in the form of social psychologism. [3] Its eclecticism becomes more apparent when one reflects that although it destroys free will, it preserves the old

[1] *Tarde*, "La criminalité comparée," pp. 149 *et seq.*, 2d ed. (Paris, 1890), pp. 143 *et seq.*; "Les anciens et les nouveaux fondements de la responsabilité morale," A. A. C. and A. C. A. C. (Paris, 1890), pp. 92, 346; "La philosophie pénale" (Lyons, 1890), Chap. III, IV; "L'idée de culpabilité," R. D. M. (15 June, 1891).

[2] *Ciccarelli*, "Tarde e la risponsabilità penale" (March, 1890); *Tarde*, "Lettera al profesor Zucarelli," *id.* (March, 1890).

[3] *Tarde*, "Les lois de l'imitative" (Paris, 1890), criticised by *Fioretti* in the "Scuola positiva" (15 August, 1891). As to the value of these sociological laws of Tarde, which preserve the old spiritualistic conception, according to which social facts are determined by psychological facts, while the inverse is the truth provided that the psychological activity is above all a product of society, see *Ferri*, "La teoria sociologica del Tarde," S. P. (September, 1885).

idea of moral responsibility, and that consequently on the one hand it bases the right to punish in conformity with the classic theories on the conditions of the individual (personal identity), and on the other, in conformity with positivistic theories, on social considerations (social resemblance). It is, therefore, a theory which is neither fish, flesh, nor fowl. The precedents of this theory show marks proving the eclecticism or desire of conciliation of which it is born. For the idea of personal identity considered as a condition of responsibility was implicitly contained in that part of the classic theory where physical responsibility is accepted, to which we also give our acceptance because it is a positive and exact principle. In other words, in order to punish a man for a crime he must be physically responsible for it. That is, he must be the author of the act in the sense that it is his — a manifestation and actual effect of his personality (temperament and character), and it must be a result of his manner of acting and reacting in the social environment.[1] On the other hand, I recognized the idea of the social similarity between him who commits a crime and him who punishes not only by saying, as Sighele noted,[2] "that the spirit of law is found not only in the moral or ideal relation, but in the physical and organic relation as well," but also when I said on the subject of the natural evolution of homicide that this crime did not exist until the victim and the murderer belonged to the same species. Garofalo also pointed this out in his "Criminalogia," stating that we could not call the most abnormal criminals fellow-beings. So strongly did he feel this that he said one of the reasons for his belief in capital punishment was that it did not arouse too much compassion when it is applied "to certain criminals who have shown their complete lack of human feeling provided that pity and sympathy do not exist for men who have no resemblance to us."

§ 264. Original Development of the Eclecticism of Tarde.

But whatever the origin of the theory of Tarde may be, it has shown an original development which we must examine, subjecting

[1] It is in this sense *Binet*, "La responsabilité morale," in the "Revue philosophique" (September, 1888), saying that "free will cannot be meant scientifically by the word liberty, but only an activity in conformity with the character of the individual" (physical liberty), showed that this was the true part of Tarde's theory; and yet he concluded by approving the theory of responsibility of the Italian positive school.

[2] *Sighele*, "Bibliography of Tarde's 'Philosophie pénale'" A. P. (1890), XI, 567.

it to criticism first as to form, and then as to substance. First, however, we must answer the question as to whether the two "identities" must coexist, or whether one of them is sufficient to make a man morally responsible for his crime. Tarde is not specific on this point. He says that congenital criminality or moral insanity is precisely the inverse of true insanity, for the latter is an hallucination of personality and consequently identity does not exist, but similarity remains,[1] while congenital criminality is the manifestation of a personality which fails in self-consistency and self-identity, but which does not resemble other men. "Consequently, in the first case as well as in the second, the two conditions are not both present; but in the first (insanity) the principal condition ("identity") is entirely lacking, and in the second (congenital criminality or moral imbecility) the accessory condition (similarity) alone is lacking, and perhaps lacking only in part." From this it follows that personal identity is the indispensable condition of responsibility; and Tarde forthwith allows the death penalty for congenital criminals, although no social similarity can be found in their case. But this difference in importance between identity and similarity is a weak and obscure point in his theory, and in order to escape from the difficulty Tarde is obliged to use at times expedients too arbitrary to be scientific. Of this we need to give but few examples. He is forced to contend that there cannot be a radical difference between the congenital criminal and other men, although congenital delinquency patently constitutes the greatest difference which can contradistinguish a man from his fellows on the point which is of the greatest social importance, that is, in a moral or social sense.

On the subject of habitual drunkenness and the responsibility which must be accorded to the habitual drunkard, he says, "Victims of the opium habit or alcoholism are powerless to escape their fate, but the power which urged them on came from an internal necessity inherent in their being; and in that it differs from the essential external necessity of the pathological nature which controls them when the insanity caused by their bad habits

[1] In answering objections advanced by Ferri, *Tarde*, "Pro domo mea" in the "Essais," p. 152, explained that he thought both conditions necessary to create responsibility. It is unnecessary to add that his answers did not persuade me, and that I maintain my attitude against his theory, which, however, did not find champions, while the theory of social responsibility is at present commonly accepted by all who abandon even to a slight degree the traditional ideas on fault and chastisement.

is finally manifested." This is a strong way of distinguishing the internal from external power in the same individual, and of then calling the external constraint the pathological force of insanity. Tarde furthermore holds that a criminal or delinquent who has truly repented and reformed must not be punished, "because he has become another man." The real reason that he should not be punished, however, is that in this unfortunately rare case he is no longer dangerous nor insane, and because protection from him is no longer necessary. That is to say, that it is no longer necessary to make a repentant man pay the penalty (although we may require detention for a certain time) when he has become not only another man, but also is no longer dangerous. If, for example, a murderer repented of his homicide but became inclined to burglary or arson, he would certainly be another man, but he would continue to be unbalanced, and consequently he would have to continue in his asylum. Tarde falls into still another contradiction in distinguishing between the voluntary change in personality and the pathological change superinduced by insanity, epilepsy, or hypnotism, although both result in irresponsibility. "In the pathological case the new ego is not only not responsible for the acts committed by its predecessor, but it is not even, or, at least, is hardly responsible for its own acts, because it is a stranger in the social world and barely identical with itself; in the voluntary change the new ego is superior to the old in social feeling and identical persistence. But putting aside the hypothesis of a new ego, which seems to enter into the body of the individual and substitute itself for the old ego, as one key will push another from a lock, what can the "greatest persistence of identity" in the repentant criminal be except a figment of fancy; and who knows whether in spite of the sincerity of his repentance new temptations may not induce him to sin again?

Fonsegriev is right when he says on an analagous subject that the homogeneity of human character (the object of education and culture) is neither tenacious nor sure, even when it is obtained by means of pedagogics. "It is a precarious state, essentially unstable and needs but an unforeseen event to awaken the former man and bring the natural heterogeneity to the surface." [1] But entirely apart from these arbitrary expedients, the theory of Tarde contains serious contradictions. First of all, there is this strong contradiction in the admission that congenital criminals,

[1] *Fonsegriev*, "L'homogénéité morale," R. V. (July, 1890).

although lacking in social similarity, are still responsible and punishable even by death; but, as a contrary argument, the question is asked whether the anomalies and follies usual to society would deprive the well-intentioned or heroic victim of hallucination of all right to recompense because he enjoys no personal identity (when his hallucinations are upon him) or social similarity. Tarde himself accepts the social observations of Ball: [1] "notwithstanding that he had passed through a period of insanity, Newton founded a system of physics; August Comte was certainly one of the greatest philosophers, and yet he had been confined in a madhouse; Luther, subject to hallucinations, still effected one of the greatest revolutions of modern times; Joan of Arc is certainly lauded for her patriotism."

All that is true, answers Tarde. Genius is an anomaly, as Lombroso said, but there is no contradiction in upholding in such cases responsibility and recompense because "there is nothing more our own and more personal than an anomaly which both distinguishes us from and likens us to our fellows; while insanity cannot be considered as an individual exception to the typical rule, but as a perturbation of the development of the individual, it could almost be called a disindividualization."

This may appear true of acquired insanity, although psychiatrists admit this perturbation only in a very relative sense (in very rare cases, for example, traumatic insanity, or that induced by poisoning), but in the case of hereditary insanity (whose existence we must admit) the individual retains his self-identity, and, to quote Ciccarelli, "He will show the same character throughout the whole course of his life," and consequently he will be responsible, even when he can be said to lack social similarity, because this quality, being accessory, is not enough of itself to destroy responsibility, for the very reason that it does not destroy it in the case of congenital criminals. Tarde answers that if it is a question of an innate extravagance, the rules that I have given concerning genius and crime must apply to this alleged illusion. This connotes a flagrant contradiction, and makes the hereditary idiot responsible. It is well known that insanity, even when it is not apparent, is always, save in very rare exceptions, of more or less hereditary origin; and the explanation of the contradiction must be that Tarde relies on a very inexact idea of insanity in order to reconcile it with his theory when he says that "insanity is a du-

[1] *Ball*, "Partial Responsibility of the Insane."

plication of personality, something of a moral equivalent to a two-headed monster." The fact is, however, that this duplication or change of personality is the exception. In insanity, as in normal cases, every man, according to the phrase of Goethe "becomes what he is." That is to say, every man develops personality that he has inherited at birth save for the reflection that one side or another of the physio-psychological prism takes from surrounding circumstances. One more contradiction: Tarde concluded that "impunity because of irresponsibility would have no consequences harmful to society." The acquittal of an insane man will encourage nobody to imitate him, because no insane man or epileptic has power of will. This is all very well, but we must add that there is no criminal with power of will. If Tarde, who we may state in passing, denies the existence of free will, denies this, one decisive argument must suffice to controvert him. It is impossible to commit a murder with a burglarous intent. Romagnosi is right. It is well for each of us to know that we are subject to the penal code when one is speaking of villainies or crimes committed in the transport of passion (evolutive criminality) or in the case of self-defense, but it is not at all applicable to atavic criminality. When I was a student at the University of Bologna, in one of the orgies of discussion concerning free will, which were then enjoyed, I overcame one of my adversaries by saying that I would believe in his free will if he would disregard any of the major social conventions, such as to traverse the city in daylight attired only in his shirt.

§ 265. Eclectic Theories of Responsibility: Tarde, Personal Identity.

And vice versa, as I said on the subject of intimidation, pathology shows that the insane are not governed by the same fundamental motives as normal men. It is, therefore, both contradictory and untrue for Tarde to hold that impunity cannot exercise a contagious influence on the insane. Finally, unsurmountable objections can be advanced to this theory. First, in regard to personal identity. No man, sane or insane, is always the same. The idea of a homogeneous personality which always remains self-identical in normal men, and which duplicates or radically changes in the insane, is absolutely unscientific. "Ordinary observation shows how little cohesion and unity the normal ego has" by consideration of human personality as presented at any moment of individual life. Apart from simple characters (in the

strict sense of the word there are none) there are in each of us tendencies of all sorts, all possible contradictions, and among these contradictions all kinds of intermediate shades and numberless combinations of all these tendencies. The ego is not only a storehouse of memories bound to the present, but a mass of instincts, tendencies, and desires which are in fact nothing but its innate and acquired constitution as it enters upon a course of action.[1]

If we consider personality in its volutive formation we cannot doubt that it changes from minute to minute in its physio-psychic elements and their combinations, although it preserves a certain permanence. So in the case of a river that one always calls by the same name although at each moment the waters which form it and the shape of its course are changed. We can speak, therefore, of personal identity only in a very unprecise and relative way, and it is clear, on the contrary, that the occasional passion-driven criminal, like the congenital, cannot be considered as identical to himself before and after the crime. Thus the first element of moral responsibility, the individual element, not only presents a very debatable scientific basis, but, furthermore, is so vague of itself that it is not possible to look upon it as a criterion or measure of the social function against crime, which requires certain and objective criteria.

§ 266. Eclectic Theories of Responsibility: Social Similarity.

The other element, social resemblance, has no greater scientific value. It is really a pure illusion analagous to that of Poletti's normal delinquents. It is impossible to speak of criminals who resemble or who do not resemble their fellows. The data of criminal biology and physiology show that all delinquents (above all those who commit natural crimes through atavic criminality), no matter to what category they belong, are more or less abnormal. We cannot, therefore, separate the delinquents similar to their fellows from those who are dissimilar, and there is no possibility of marking the minimum lack of resemblance which is equivalent to a true accord. Tarde also makes an untrue assertion on this point, stating that punishment requires social similarity.

If an Australian or a Zulu, lately arrived here, should commit murder who would dare to call him irresponsible? Yet he differs from us as much as possible. "A cannibal," said Manouvrier

[1] *Ribot*, "Les maladies de la personnalité," p. 37.

wittily, at the Congress at Paris, "who came here and ate a small Parisian boy, would vainly have his attorney plead that he did not belong to nor have anything in the least in common with the society of his prosecutors and his victim." [1] So it can be seen that the only true and positive reason for human responsibility which always inexorably comes to the surface is the need of social protection against the authors of every anti-social act, whether they be identical to themselves or not, and whether they resemble their fellows or not. In conclusion, we do not understand how Tarde can have said: "To understand responsibility in an entirely objective and materialistic sense would be to return to the primitive days when Œdipus was judged culpable of a crime that he had not intended nor willed. No Catholic need repent of having eaten meat on Friday without knowledge or intent; and for the same reason society cannot condemn a man for the harm that he has done, even were it homicide, if he acted without an exercise of will."

Society, however, does every day punish homicides committed without the exercise of will. Furthermore, it is clear that a denial of free will destroys the defense of insanity in homicide. On the other hand, as I have already stated, it is entirely different to say that the reason of individual penal responsibility lies in the objective fact that the individual lives in society, than to say that society in reacting against an anti-social act must never take account of the psychological conditions of the agent in order to suit the defensive means to the offense and the offender. Every clinical function consists in finding the causes of the disease and fitting the remedies to the conditions of the patient and of the place where he lives. The same method must be used for ordinary patients, for the insane, and for criminals. In all events, it is clearly shown that the eclectic theory of Tarde, like the other eclectic theories, is not only incomplete and contradictory in itself, but, above all, lacks a scientific base in the elements which constitute it. There remains only one objection, which Ferri, Manouvrier, and Coutagne have already made to Tarde's theory in the Congress of Criminal Anthropology at Paris. Without regard to its other defects, it would be too practically dangerous and uncertain to be accepted. If, as Tarde admits himself, "there are infinite degrees between absolute identity (either of the person or social circumstance) an inaccessible ideal, and their absolute

[1] "Actes du 2e congrès" (Paris, 1890), p. 371.

heterogeneity equally impossible to grasp," [1] it is clear that the two criteria of responsibility would be insufficient in practice to distinguish the men who should be punished from those who should not, and insufficient in the intermediate associations between insanity and crime which are always present to measure the degree of responsibility.

§ 267. Eclectic Theories of Responsibility: State of Criminality.

In conclusion, we will say a word concerning a theory recently advanced by Poustoroslew of the University of Jouriew to show an example of the fantastic reasoning followed by eclectics. He holds that criminality does not lie in the material act but in the agent who executes it, because it may either be a punishable homicide or a legitimate act to kill a man, dependent upon the subjective conditions of him who does it. On this point, Poustoroslew approximates the method of the positive school and considers the delinquent rather than the crime. As a consequence he concludes that the reason for accountability, and, therefore, of punishability, consists in the "state of criminality." This had already been vaguely pointed out by Foinitski in an inaugural address on The Theory of Punishment, published in the "Journal Judiciaire," of St. Petersburg, in 1893, where allusion is made to the author of an act which results in harm. "No human being can, unless he is in an individual state of criminality, commit a crime or misdemeanor, but each of his harmful acts proves in its turn the existence of such state in the agent." [2]

This theory, moreover, corresponds in a vague way to the data of criminal anthropology which has led us to believe that the external occasions of physical and social environment are not sufficient "per se" to produce crime, unless reinforced by the personal or anthropological factor of an abnormal organic and psychic constitution. And yet, adds Poustoroslew, this state of criminality does not depend upon the free will or intelligence of the individual, but is rather the product of the conditions of existence and the occasional circumstances which surround men who have led honest lives prior to the commission of the crime (he does not consider the case of police contraventions); and in the case of those who have already committed other crimes, it is the product of a temperament which tends to lead them into a state of crim-

[1] "Actes du 2e congrès" (Paris, 1890), p. 353.

[2] *Poustoroslew*, "Criminalité et imputabilité" (Jouriew, 1889), p. 10.

inality. And all this, although he declares that he does not believe in the existence of the born-criminal of the Italian school, merely because he believes that the Italian criminologists think a congenital tendency sufficient in itself for the production of crime without the presence of physical and social factors. This state of criminality constitutes the imputability of the criminal, simply because it can be seen when all the circumstances denoting excusable error, physical distraint, necessity, and invincible hypnotic suggestion which prevent the act imputed to the agent who does it, are lacking.

It can be seen at a glance that this theory, wavering between the old and new ideas, is as incapable as the present doctrines of breaking away from the supposed necessity of an absolute justification of human responsibilities. This justification exists, of course, in a complete and positive form in the simple fact that the individual lives in society. Out of respect for traditional principles he speaks of a state of criminality, which in its designation of the anthropological factor of crime corresponds to reality, — but which in connecting this fact of imputability introduces a useless double meaning, and fails to give a positive reason for this same imputability which ordinarily exists, even if we admit the non-existence of free will.

CHAPTER VI

TWO FINAL PROBLEMS OF JUSTICE WITHOUT FREE WILL

Forms of social sanction. Criteria of social sanction. Preventive, reparatory, repressive, and eliminative means.

§ 268. Insufficiency of Other Theories of Responsibility than the Positive.

We have taken much time in examining the different theories of responsibility advanced by eclectics who waver between the classic and positive theories, and we can now conclude that while every such theory, taken by itself, has been found inacceptable, they all present the same common characteristic, because they are at bottom only verbal variations of the old theme of moral responsibility founded according to these new theories no longer on absolute, but on relative and limited moral freedom. All that these attempts at reconciliation and affiliation between the old and new ideas prove is "that the old and vague notion of responsibility has gone for good, and the task of the sociologist is not to galvanize it into life, but to find what can enter in its place in the living consciousness of humanity." The geocentric illusion that the earth is the center and the foundation of the cosmos has long since disappeared, so also the anthropocentric illusion that man is the lord of creation and that he of all animals, because endowed with free will, can dominate and determine events in place of being governed by them, must go.

Equally buried in the past is the individualistic illusion that denies in the world of biology the infinite power of physical and psychical heredity, and creates in the field of sociology artificial obstructions between the individual and society. How then can we still speak of the moral responsibility of the individual for the acts committed by him.

Finally, without counting that all the eclectic theories have a common characteristic similar to that of the classical theory, that penal responsibility is subject to the conditions and tests of moral responsibility, still they are subject to the danger of making the most dangerous malefactors irresponsible be-

cause of the atavistic form of their criminal activity. Of course, these eclectic theories permit society to take administrative or political social measures against dangerous malefactors. This, in itself, is eclectic, but this middle term does not answer because belief in their irresponsibility cannot easily be reconciled with the severity of the measures used; and defense of society is weakened and enfeebled (if it exists at all) when it is even tolerated against the most dangerous atavistic criminals merely as a concession to the abstract theory of the simple necessities of practical life. Not only, therefore, do the positive studies reviewed in the preceding paragraphs prove the scientific truth and practical utility of the positive theory of responsibility as a basis for the social function of prevention of crime, but a criticism of the classical and eclectic theories considered of themselves and in their consequences brings great weight to bear in favor of positivism.

§ 269. Application of the Fundamental Principle of Responsibility to Crime.

It is not enough to have established the fundamental principle of penal responsibility in order to be able to deduce its practical applications, but scientific criteria must be added which will make it possible to fit this responsibility to every crime and every criminal. If we turn our attention once more to that series of facts already cited as examples and kinds of physico-biologico-social laws, we can reach another positive conclusion which will complete the fundamental idea of social accountability. That is to say, it will establish a rule entirely independent of the moral force of the agent. For although law of itself has a reaction which is constant in every case and consequently independent of what the agent has or has not willed, still the character and intensity of this law vary in different classes and in different cases of the same class. This is true not only in the social order, but in the physical and biological. A man who leans too far out of a high window falls, breaks his neck and dies, while he who trips in the street gets off with a scratch. So he who swallows poison dies, while he who gets indigestion is sick but a short time. So he who overworks himself for a short time gets a headache, while he who disregards his health for years ends in a madhouse. The ignorant and stupid may, therefore, cause a social reaction similar to that of the slanderer and the insolent, but very different from that which the bankrupt merchant undergoes, a crazy man who attacks a passer-by, or a driver who runs over some one.

But this is not all. If for each one of these social acts the quality of the law remains basically the same, still the degree and severity vary according to the circumstances of the agent and the special class with which he lives. Of two slanderers one can be considered heedless, while the other is looked upon as malicious. Of two bankrupts one awakens more compassion and receives more help than the other. The two convicted drivers do not necessarily undergo imprisonments of equal length. All this leads to the inevitable conclusion that in every case the social right is independent of the moral fault of the individual, but changes in quality and degree according to the particular circumstances of the individual, the act, and the society in which he lives. But, just as in the first part of this positive induction we have seen that it was logical and necessary to extend positivism to every kind of social law, and including the restrictedly penal laws, so now in this last part which completes our earlier induction, we are obliged to recognize that even in laws relating to crimes properly so called, the quality and degree must vary with the different circumstances of the individual, the act, and the society which reacts.

And thereupon we can reply without trouble to the criticism first made by Guyau and afterwards repeated by many other students of the conception of social accountability which I have advanced. This writer, who wavers constantly between old and new ideas, admits, however, that the only reason which justifies punishment is its necessity and efficacy for the defense of society; — and in this admission he accepts the Italian Positivist School. But he disagrees with me in excluding every volitional and intentional element from punishment. "Social laws," he says, "cannot, no matter what Ferri says, be simply mechanical like natural laws. Internal and psychological determinism of the agent must receive legal consideration because his attention (in a case of tort or negligence) and intention (in the case of crime) must be weighed, just as one must consider not only the volume of a waterfall, but its momentum. This is why the criterion given by Ferri of social and anti-social motives governing action will not answer. The quality and quantity of the will behind it must be considered."

This criticism contains, as can be seen, two objections; (*a*), social laws must not be invariable or mechanical, (*b*), the differential test must not only be of the social or anti-social quality of the motives determining the act, but also of the quality and quantity of the

will promoting it. As to the second objection, besides what I shall say hereafter concerning the test of motives determining action, it suffices to observe that under a scientific conception of will, it becomes very difficult, as I pointed out at the beginning of this chapter, to see any clear and definite difference between the determining motives and the "will which is back of them," but I reserve to myself the right, as I have just said, to show in a later paragraph the entirely sufficient and positive character of the criterion of the determining motives which I have advanced.

I will now answer the first objection made by Guyau.[1] It is easy to overthrow this objection, for, although all forms of social law must be, like physical and biological laws, independent of the criterion of the moral liberty of the agent (and that it should be purely dynamic through an entirely natural action and reaction of forces), it does not follow (and my conclusion is in fact entirely different) that society must react always in the same manner and with the same severity against all kinds of anti-social acts. It can be seen, therefore, that this objection made by Guyau, and since repeated by many others who are apparently astonished that we can still speak of the sociological condition and determining motives of delinquents, is based on an equivocation and a confusion of the moral freedom and fault of the delinquent which are not accepted by us, and his psychical conditions which we do not in any way exclude. We, therefore, agree on the legal principle that a death caused simply by negligence must be subject to one rule, that is to say, provoke one reaction different from that which a homicide for money or for vengeance will cause.

And further, in this special case, I personally find an even more essential difference between the two rules, because in involuntary homicide, imprisonment which differs only in length and name from that which is inflicted for intentional homicide is illogical and useless. And so we are entirely in accord on this point, that a failure resulting merely from imprudence or ignorance must be punished in a way — extra-legal in public opinion and economics, legal in being imposed by a judge — different from that which attends a fraudulent bankruptcy. And finally, we are perfectly in accord in recognizing that the same punishment must not be imposed upon a sneak-thief as upon a highwayman. But we must further consider whether practically these different forms or social laws have been preserved in the form in which they have been

[1] *Guyau*, "Critique de l'idée de sanction" R. P. (March, 1883).

pictured by the classical criminologists, and in the classical works on punishment. These reforms in penal methods and procedure I will take up in the last chapter of this book. In the meantime, the elementary idea of social or legal responsibility, that governs every act of a citizen, is completed in the other idea of the different quality and degree of punishment attached to this responsibility. And this brings before us two fundamental problems, with the solution of which I will leave this positive theory of penal responsibility.

A. What are the different forms of social sanction by which the legal responsibility of the citizen for his illegal acts should be manifested?

B. What will be the criterion which will indicate in each special case the form and degree of social punishment most appropriate?

§ 270. Greater Importance of Prevention.

To begin with the first of these problems it is natural to point out at the beginning that we are speaking now of the forms of legal sanction; because those of extra-legal punishment, such as public opinion, natural economic consequences, punishments inflicted by the Church, or by conscience, although very efficacious aids to the defense and preservation of society because spontaneous, and tending, some of them at least, to increase constantly in intensity and extent, do not, properly speaking, enter into the field of juridical science, which is our subject, although they must enter into the conclusions of the practical sociologist whose discoveries aid the legislature. It is with this practical criminal sociology, which can be called as the Germans call it, "Kriminalpolitik" (criminal politics), that the conclusion of this book will deal. Some of our critics have recently thought that criminal sociology, as we understand it, that is, the study of crime as a natural and social phenomenon, and not as a purely and abstractly juridical phenomenon (and consequently as criminal law reformed by the positive method), is not and must not be simply the practical art of criminal police distinct from the science of crime and punishment. It is, on the contrary, the basis of any practical administrative acceptance in the systematic indication of the different forms of social reaction against individual anti-juridical acts and forms the task of the criminal sociologist, that is to say, the object of the science relating to the laws of social security. Such a study must consider the entire variety of daily facts, which shows the

excellence of the positive method of the new school, which, in place of reasoning on crimes considered by themselves as abstract juridical entities, observes actual facts as natural phenomena enacted by individuals who present special and different physio-psychological characters in a different physical social environment. But on this subject, from its very beginning, the positive criminal school has been able to boast of two signal successes which are long steps towards a happier and surer development of social life. For up to the present time the classical school, because of its reasoning that crime, being the effect of a will which abused its freedom, must be absolutely prevented or repressed by punishment directed against the will, which punishment, must, at the same time restore the violated right and establish tranquillity, — up to the present time, I say, the classical school has reduced the function of social defense to penal and repressive measures, and yet it admits on one hand preventive means, and on the other, repressive means, against insane delinquents, as aids, however, which have not a strictly juridical character. Almost all the classical criminologists make little allusion (if it occurs to them at all) to the civil or reparatory means as instruments of social defense against anti-juridical acts of a criminal character.

They create an essential difference between civil and criminal law. At most, they look upon civil compensation for damages consequent upon crime as entirely accessory through the fiction of a contractual relation almost entirely neglected in practice. But the principal consequence of crime, that which is by far of greatest interest, and which alone interests the public, is punishment.[1] Now this shows the first service rendered by the positive school,

[1] Among the classicists, however, *Binding*, "Die Normen und ihre Übertretung" (Leipsic, 1872), I, 166, 2d ed. (1889), holds that there is no difference between pecuniary reparation and punishment, although he, with different intentions and method than the positive school, it is true, also holds that there is no difference between a civil wrong and a criminal act. See also *Binding*, "Grundriss zu Vorlesungen über das deutsche gemeine Strafrecht." Since the Italian positive school insisted on the social function of reparation of damage done, this subject has been seriously studied in the positivistic school by the "Union internationale de droit pénal," and even made a subject of debate by the "Congrès pénitentiaire" at Paris (1895) and Brussels (1900). In France, to-day, thanks to Jusserand, an "objective" theory of civil responsibility has been begun, which, relying on this idea, which I introduced into the theory of penal responsibility, that responsibility is independent of fault, confirms the common reason of civil and penal responsibility. See *Saleilles*, "Essai sur une théorie objective de la responsabilité" (Paris, 1897); *Pugliese*, "Della responsibilità (civile)," in the "Rivista giurisprudenza" (August, 1899); *Angiolini*, "Colpa, risarcimento e pena."

which insists on the practical necessity pointed out by logic and the positivist theory of collecting in a single system all the different means of defense, of which society can avail itself against anti-juridical acts. So far from separating in an almost irrevocable manner the civil and the criminal, the preventive and repressive, the defensive and the punitive means, it coördinates them in an organic whole and uses all of them for the defense of society against crime.

In reply to this belief of the classical school, according to which there is a veritable chasm between the art of good government, that is to say, of prevention, and the science of penal administration, I have answered with the approval of other positivists that prevention and repression are, on the other hand, only two phases of one and the same function affected by the same organ of society, with one and the same end. This end is the preservation of society; the problem, the study of the most efficacious and useful means of obtaining protection both for society and the individual. Of course, the criteria are different for prevention and repression; but distinction does not mean separation. One must decide which of these two phases of the same social function is entitled to the greater weight. We have already answered this question in the earlier chapters through the aid of psychology and criminal statistics; but we have to admit that both for the prevention and repression of crime criminal sociology must always be based on the fundamental rules for the study of phenomena.[1]

[1] This is the reason that the positive school does not admit any essential difference between crimes and misdemeanors, such as all classicists make with rare exceptions. (See, among others, *Filomusi Guelfi*, "Enciclopedia giuridica," 3d ed., Naples, 1885.) Both are anti-social actions against which a penal sanction is, or appears, necessary, and there is between crimes and misdemeanors only a difference in degree. It cannot be said that crime is an intentional violation of a right, while a misdemeanor really endangers it, and consists rather in the non-premeditated violation of a prohibition intended to protect rights and interests; for there are crimes without intent and without consequent damage, as there are misdemeanors of vicious intent and followed by serious damage.

This is so true that the Italian Penal Code includes among misdemeanors a number of acts which are really crimes, and the Austrian Penal Code provides that many actions can be, according to circumstances, crimes, or misdemeanors; and difficulties can be found every day in practical jurisprudence when a precise separation of crimes and misdemeanors is attempted. It is not always possible, for this line of demarcation does not exist in fact. See *Ferri*, "La cosidetta volontarietà nelle contravenzioni," in the "Difese penali e studi di giurisprudenza" (Turin, 1900), p. 402; *Stappato*, "Dell' elemento soggettivo nelle contravenzioni" (Venice, 1895). See also *Berenni*, "La suoiettività del reato" (Naples, 1899) (extract), which makes non-premeditated crimes misdemeanors.

And we can go even further and say that this method of considering prevention and repression alone prevents exaggerations on one side or the other. With absolute separation, too much importance is given either to repressive administration, and then punishment is looked upon as the only means of juridical or social protection, and the illusion is reached that it is only necessary to formulate a penal code or to add exceptional penal laws to it in order to prevent or diminish crime; or else prevention attracts too much attention, and one sins on the other side. That is to say, individual rights (which we, as well as the classicists, consider sacred) are unnecessarily disregarded and all repressive protection is considered as absolutely useless and absurd. And so, at the first blush, one is forced to agree with such authorities as Owen, Girardin, Wyrouboff, and Minzloff, who have made but a superficial study of the new data of criminal sociology. But we, basing our conclusions on the positive study of criminal phenomena, believe that prevention and repression are equally necessary for the protection of society, just as hygienic prophylactics and clinical therapeutics are both used as protection against ordinary sicknesses. And it is only in accordance with the data of anthropology and criminal statistics that we determine upon one of two kinds of defense. Social prevention of crime has and must have a greater importance and utility both for the individual and society.

§ 271. The Relations of Criminal and Civil Law.

As to any more marked separation between the civil means of reparation and repressive means, between civil and criminal law, I can find no positive reason, because there is no essential difference between civil and criminal law. They are, in fact, neither separate nor distinct in the primitive phases of human evolution. And because there is no distinct line of demarcation between them, there was a period when punishments were exclusively civil, that is to say, reparative. It is only the course of time giving social phenomena great complexity and development that has separated these two branches. In the same way it has more recently contradistinguished the law merchant, administrative, constitutional, international, and business law. But civil and criminal law have always remained two branches springing from the same trunk, two aspects of the same order, two views of juridical facts — one taken from the normal or civil side, and the other from the

abnormal or criminal side. The absolute separation of civil and criminal law has not only obliged jurists to expend their energies in inconclusive theories, but has resulted in dangerous practical consequences. For, placing a chasm between civil and criminal penalties has drained an abundant source of efficacious means to hinder the repetition of anti-juridical or criminal acts by delinquents, and to prevent the contagion of bad example spreading crime to others. In fact, according to the observation of Bovio,[1] which had already been suggested by Filangieri,[2] "We can see that in the societies where civil remedies are most prompt, facile, and just, there is the least need of recourse to criminal punishment. Of this, we have a famous historical example in the unparalleled excellence of civil law in Rome, and in the relatively slight development of their criminal law. On the other hand, as the statistics of Candolle[3] and Zincone[4] prove, when civil justice is slow, difficult, and expensive, crimes of violence increase in number. For these reasons, as I have already said, the positivist school upholds the theoretical and practical necessity of organizing in one system all the instruments adapted to the social function of the maintenance of order, both preventive and repressive, civil and penal, which society can use with justice.

§ 272. Positive Means of Social Defense.

There is a second benefit given by the positive school. It is the proposal (and it shows the means of using it) to adopt other means of defending society which have been and are held illegitimate by the classical school because they contradict its theoretical principles. And yet the classical school, after refusing to recognize them, has been forced to accept some, such as asylums for the criminal insane and farm labor for convicts, as Franchi has shown.[5] The new school as a reply to this problem — what are the various kinds of social sanction by which the juridical liability of the citizen should be manifested? — has given

[1] *Bovio*, "Saggio critico del diritto penale" (Naples, 1877), p. 11, § 4. For the inverse evolution of civil to penal justice, see *Durckheim*, "De la division du travail pénal," pp. 142 *et seq.*

[2] An observation which I have recalled at the end of § II, chap. I.

[3] *De Candolle*, "Sur la statistique des délits," in the "Bibliothèque universelle de Genève" (1830).

[4] *Zincone*, "Del aumento dei reati" (Caserta, 1872).

[5] *Franchi*, "Il progetto Giolitti per il lavoro dei condamnati all' aperta e il diritto penale," S. P. (January, February, 1903).

four different forms of social reaction against anti-juridical acts, which correspond to four classes of defensive measures.

Abstract reasoning, always going further and further from the world of reality, ends not only by losing all sense of reality, but also by creating gratuitous difficulties where none exist. For example, where criminal classicism has lost its sense of reality, where it has failed to see other forms of social preservation against anti-juridical acts, beyond the confines of punishment, positive criminology in order to solve the difficulty, apparently impossible of solution, concerning the different forms of defensive social reaction, only asks this simple question: — What proportion and what kind of defense would a prudent man adopt who wishes in the continual buffetings of life to protect himself by his own strength from danger? There is no need of a genius to answer this question. He would begin by taking care not to arouse against him the people that he met, and by suppressing or diminishing as far as possible their temptations to do harm to his goods or his person. Then if some dishonest or malicious individual attempted to commit an offense against either his goods or his person, he would try, if there were time, to make him give up his aggressive or dangerous act, forcing him to follow a regular course of action. If the act was completed, he would destroy, if it was possible, all its legal consequences. If that was not possible, he would force the aggressor to repay either in kind or in the universal equivalent, "money," the damages caused. If he saw that this reparation would not be a sufficient guarantee against a repetition of the attack, either by the first aggressor or by those around him who would be tempted to imitate him, he would confine the aggressor if he could, legally or actually, by taking away from him, for example, the power of representing him in his civil or commercial affairs, or by not calling him in as doctor or engineer in case of need. In graver cases he would see that he was imprisoned for a longer or shorter time, according to circumstances. And lastly, if either his past experience of other men of the same type, or more personal experience that he had had with the offender himself, convinced him that a "good lesson" would not suffice to deprive him of the criminal desire, and that he would be, without other means of possible defense, continually exposed to his attacks, then he would employ severe remedies. If the absolute necessity of preservation from an unjust and imminent attack imperiously demanded it, he would not hesitate to put an incorrigible and dangerous ag-

gressor to death; or if he could bring about the result in any other way, for it is always repugnant to the sentiments of humanity to kill a man even in the most pressing need, he would so act as to free himself definitely by placing him in some distant place where he could lead a new life without danger to the victim.

This simple and practical reasoning any one of us can hear uttered by any man of sense, even if he is ignorant of the names of Cujas and Carmignani; and this is the practical reasoning that the positive criminologist attributes to society, considering it as a living being who not only in the exercise of the function of punishment, but in every other order of life, obeys exactly the same laws and encounters exactly the same grave and complex necessities of existence, and follows the same fundamental lines as any individual follows in his own life. But, as is natural, the measures taken by society demand an infinitely more complicated mechanism; yet this argument does not in the slightest degree destroy the fundamental identity of principles and purposes. The complication is so great that (to give but a single example) the intellectual operation, which is an almost instantaneous reasoning of the individual attacked, that is, a judgment formed from sensations present or hardly past, becomes, on the other hand, in society a tortuous course of criminal procedure, which, however, contains in its structure and in its final results only the simple judgment by which a man foresees with certainty an act dangerous for himself on the part of another, and recognizes immediately the necessity of avoiding its consequences, or, at least, of preventing its repetition. And this is precisely, apart from the long road which we must travel in order to follow the idea which we have indicated, the system of defensive measures which positivism believes to contain the different forms of social reaction against anti-social acts.

§ 273. Positive Means of Social Defense: Preventive Means.

Preventive means considered abstractly cannot, of course, be a legal form or reaction, because they are anterior to the anti-social facts which they aim to prevent. But, on the other hand, if preventive means in a final analysis consist in a series of restrictions on individual or social activity, it is easy to recognize their legal character, applied, it is true, in the most indirect and least consequential form, as the hygienic rules to which they correspond do not seem in comparison to therapeutics or surgery to

present the character of real remedies. But since in the hygiene of the individual, as in that of society, both these sorts of rules are in fact so many restrictions, so they are in fact remedial and have but one end, — certainty of protection. It is precisely because these remedies are preventive, that is to say, because they impose a restriction before the appearance or development of the ill, and although at the present time included in the hygiene of the individual as well as in that of society, they are neglected either because he who must take the preventive measures yields to the temptation of the course of least resistance and awaits the ill before putting any obstacle in its way, or because individuals themselves, seeing that the little forethought which they usually take is useless, find complete privation too hard when the ill seems distant. They can be divided, as Ellero said,[1] into two main categories. First, measures of direct and present police. These are the least useful and least efficacious, because they attempt to hinder the crime only when the causes of it have developed (and they have a repressive character). However, these (for the reason that we have given) are the ones which have up to the present time been employed in science and legislation. Second, measures of indirect and distant police which tend to suppress or render less harmful the causes of crime, and which under this head in the measure of their efficiency are truly and properly penal substitutes, as I have called them, provided that "once the crime is suppressed punishment is suppressed also."[2] This subject I have taken up at length in a prior chapter.

§ 274. Positive Means of Social Defense: Reparative Measures.

The reparative form of social reaction or regulation, like the others which remain to be dealt with, differs from the first and larger category of preventive means, because it can be used only when the anti-juridical fact, the injury, or "unrecht," like civil damage, tort, or crime, has already been effected. Consequently, this form of rule, like those which are to follow, has a much more restricted power, and one which is constantly being restricted as one advances from the first subdivision of reparatory means to the last or eliminatory form of social regulation. The reparative means

[1] *Ellero*, "Della prevenzione dei crimini," in the "Opuscoli criminali" (Bologna, 1874).

[2] *Turati*, "Sulle critiche alla nuova scuola anthropologica criminale," in the "Arch. di psich." II, 3.

can be divided into three distinct varieties, — the suppression of the anti-juridical state, the nullity of the effects of the anti-juridical acts, and the reparation of damages caused by such acts. When an anti-juridical act has begun, the first most natural and most efficacious remedy is to prevent its accomplishment and to suppress its continued existence. If this is not possible, the only thing remaining to be done is to deprive the effects of this act of all legal value, if the effects have not yet been realized. Or, lastly, to oblige the agent or his estate to repair the damages caused.

These reparative means may be used either as principal measures or as accessory rules, according to the physio-psychological character and economic responsibility of the agent. All anti-juridical acts, even if premeditated or caused simply by negligence, are not actually criminal. Social reaction takes place against every act of an anti-social character; but we must further remember that there can be many degrees of anti-sociability, or, to be more accurate, we can say that they are acts simply anti-social because they are harmful to the interests of a citizen taken by himself "uti singuli" or collectively, and extra-legal rules which I have already mentioned are sufficient in such cases.

There are acts really anti-juridical because they violate the rights of citizens and then legal punishments are necessary,[1] which, however, are confined to reparative means or civil punishment unless the anti-juridical act takes on a criminal character, and either in its evil intent or by its determining psycho-pathological conditions proving that the agent is eminently dangerous. Or, in the third case, such act can have a truly criminal character and then further punishment is necessary, more properly called penal or repressive; and in some cases the ultimate punishments which are eliminative. The conclusion is, therefore, that every anti-social act entails a form of punishment in proportion to its character and the character of the agent. The positive school is not forced to separate breaches of ordinances from crimes properly so

[1] To tell the truth, the distinction between interest and right is very relative; it is as *De Faleo*, "Discorso del 3 Gennajo, 1884," p. 23, said, "only a vague difference easily overcome." Here we are dealing with well-marked cases, where there is a profound difference between simple interest and true right, properly so called, the latter being based on a legal sanction, the former not, but this, of course, does not prevent the distinction, being in intermediate cases, very relative. See also *Porro*, "Gli obbligate legali e le loro sanzioni," in the "Monitore dei Tribunali" (1893).

called, or the civil from the criminal courts. This is the only rational way to withdraw from strictly repressive punishment certain acts which, although anti-social and anti-juridical, are not truly criminal, such as unpremeditated wrongs and certain others which, although premeditated, have a special character, such as for example adultery. To such acts we hold that reparatory means must exclude criminal means, or at least a great preference must be given to the former. Thus, while the classical school eradicates all moral, and consequently, all social responsibility in acts where there is but a slight malfeasance (although some criminologists except homicide, and Carrara, maintaining irresponsibility in this case, still upholds the necessity of civil reparation), we on the contrary extend social reparation as far as possible in those cases anti-juridical, but not criminal where reparation for harm done is available.

§ 275. Positive Means of Social Defense: Repressive Means.

These are some of the temporary punishments admitted to-day by penal codes which should be preserved. Examples of them are imprisonment, farming colonies for adults and minors, enforced rustication, fines payable by work, and suspension from trade or profession. They should always be temporary, and, as a general rule, for an indefinite term. They should be employed only for slight malfeasances in cases of delinquents who are not dangerous, and who can probably be thus prevented from becoming recidivists, and only in cases where their acts and character do not constitute a great danger for society.

§ 276. Positive Means of Social Defense: Eliminative Means.

Eliminative means tend to prevent recidividity, and should be employed in cases of atavistic criminality against the most criminal acts, which are dangerous in the extreme, either by their gravity, such as homicide, rape, and arson; or by the character of the agents, born, insane, or habitual criminals. These means or forms of punishment have for their objective point the purging of the social body of non-assimilable elements which constitute a continuous danger. They differ according to the different physio-psychological character of the delinquents. They are, aside from capital punishment, asylums and farming colonies for the criminal insane.

§ 277. Positive Means of Social Defense: Summary.

Such are the different forms of punishment. I have already from a practical point of view dealt with the category of preventive means in the preceding chapter on the subject of the equivalents of punishment. I will take up the practical organization of the other forms in the last chapter. The brief outline just given, however, will serve to show that science must control the preventive or preservative social functions as well as the punitive. There is a series of steps in the reactions from the first measures of social hygiene direct and indirect to the last and most severe, which is the perpetual elimination of the individual whose intellectual and moral premeditated wrongs absolutely and irremediably unfit him for social life. To return to our comparison with biological medicine. In sociological medicine, the great classes of hygienic measures (preventive means), therapeutic remedies (reparative and repressive means), and surgical operations (eliminative means) form the arsenal which enables society to face the permanent necessity of its own preservation.

CHAPTER VII

THE CONDITIONS OF CRIMINALITY

The act, the agent, and the society. The right violated. The determining motive. The anthropological category of the delinquent. Practical examples. Attempts. Complicity. Classical intricacy and positivistic justice.

§ 278. The Criteria to Determine the Form of Punishment in Any Case.

Mouton very wisely says: "Even after having answered the primary question of responsibility according to the theories of the positivist school, *i. e.*, by denying all moral responsibility or culpability, the question of the right to punish and its social applications remains undetermined."[1] Up to this point we have answered the first of the two final problems which develop and complete the positive idea of responsibility. We note the different forms of social punishment which must enforce upon the citizen his responsibility for anti-juridical acts, but the second remains, — the criterion which will show in each special case the most appropriate form and degree of social punishment. As can be easily seen this is the technico-juridical part of criminal sociology. It is this part that permits us, after obtaining a general outline of the criteria, to apply them with variety and accuracy to the many necessities of daily life. It is this new part which must be opposed to the confused and pompous display of "a priori" principles, by which the classical science has in the present day governed the practical exercise of penal law, with a luxuriance of constantly more subtle and refined rules and regulations, which the legislators have in vain tried to formulate into codes, while the judges have worked to exhaustion to adapt them to the living realities of life.

We shall not be able in the narrow limits of this chapter to develop the new positive theories in detail, for two reasons: because we must deal with them again in the following chapter from the point of view of practical reform, and because this more technically legal part of our work has been already splendidly dealt

[1] *Mouton*, "Le devoir de punir" (Paris, 1827), p. 12.

with by other positivists. For the positive school from its beginning, as far as the rules by which social defense must be measured, has been based on a work of Garofalo, which, though it may not contain the actual problem in its entirety, still contains at least the statement of a positive rule, that of the temibility (or more or less dangerous character of the delinquent) which Garofalo emphasizes to such an extent that he hardly allows the dawn of the new school to be seen in his works. But it was a singularly happy intuition, since confirmed by every new discovery and become the keystone of the new scientific arch. Garofalo, adding in a later work [1] the test of the adaptability of the delinquent to his social surroundings to the test of temibility which he at first advanced, enunciated this law, that "the manner of punishment must be determined by the possibility of the adaptation of the offender. In other words, by an examination of the conditions of life in which there is a presumption that he will cease to be dangerous." He further developed a complete system of punishment which seems to me to need completion, however, especially in its directive criteria. We must hasten to add, however, that the tests of the temibility and adaptability of a delinquent, even if constituting a positive and infrangible rule, are not sufficient "per se" to solve the problem. They fail in their total disregard of preventive means and in another serious omission.

Two things must be sought. First, — What is the form of social punishment, that is to say, what are the defensive means, which best fit the different cases? Second, — To what degree must the defensive means determined upon be inflicted for each agent of an anti-juridical or criminal act already committed? The criteria of temibility and adaptability answer the second of these requirements only in a most general way. As to the first, it is the capital conclusion of criminal anthropology and sociology that the delinquent, in place of being an algebraic type, in place of being a man like his fellows, as classical science and legislation picture him, presents on the other hand in his organic and psychic characteristics many anthropological varieties with different potentialities in anti-social activity. On this conclusion, let us repeat, sociology and legislation base their rule of fitting the different

[1] *Garofalo*, "Di un criterio positivo della punalità" (Naples, 1880). Its idea was contained in an article in "Studi recenti sulla penalità," published since October, 1878, in the "Giornale Napolitano di filosofia e lettere," also in the second edition of "Uomo delinquente" by *Lombroso*, and "Teorica del imputabilità" by *Ferri*.

means of social defense to the different categories of delinquents. For example: Eliminative means are employed for the most dangerous born-criminals and for the criminal insane who form a permanent danger to society. Temporary repressive and reparative means are used for occasional delinquents or delinquents by passion. The second requirement relates to the degree of juridical responsibility in each delinquent and for each crime. On this point, I believe that the criterion of the temibility and the adaptability of the delinquent must be applied to particular cases with due regard to two positive and complementary rules; of the greater or lesser anti-social quality of the act, and of the greater or lesser anti-social quality of the agent. To quote Blanchemanche, "The criminal act must not be counted as one of the means by which the anomaly of the delinquent can be determined, but the extension of the repression must be measured by it." [1] The first of these rules, which was pointed out by Garofalo, results from two elements. The first is the right infringed, upon which the classical school formerly based this classification of crimes, with exclusive absolutism, and which we accept, objectifying and completing it, however, by the sum of our positive data. The second element is the determinative motives of the act, which I believe forms one of the essential parts of the positivist theory of juridical responsibility.

§ 279. Determinative Motives of Action.

I have already fully dealt with one of these fundamental norms, that is, classification of crimes, and I need therefore only add a

[1] *Blanchemanche*, "Des principes de la responsabilité pénale," in the "Palais" (Brussels, 1889), p. 216; *Carnevale*, "L'arbitrio del giudice nell' applicazione della pena," in the "Rivista penitentiaria" (August, 1898), says that to consider crime as a symptom to judge the delinquent and not as the only object of a penal judgment, is to punish a man not for what he has done but for what he is capable of doing, and he is shocked by this result as if it did not happen every day in criminal courts.

Our only aim is to render this criterion of the offensive power of the delinquent more systematic, just as in insanity the patient is treated not only with a view to past and present insanity, but also with a view to possible relapses.

Furthermore, all the critical ingenuity of Carnevale is reducible to saying that the judge will be able to consider the anthropological criterion (the offensive power of the delinquent), but still with an eclectic reserve and expression.

To the same effect *Vaccaro*, "Psicologia e procedure penale," in the "Antologia giuridica" (August, 1896). This is a thesis analogous to that of the writers who hold that criminal anthropology can be spiritualistic, as *De Baets*, A. C. A. C. (Geneva, 1897), and *Andrade*, "Antropologia criminal spiritualista" (Madrid, 1899), have done.

few words on the subject of the determinative motives of action. The only single positive idea that I have advanced in the second part of my book is "sulla teoria dell' imputabilità e la negazione del libero arbitrio." For all volitive deliberation, that is, all human action, is only the necessary result of motives which at a given moment are present in the consciousness of the individual and which influence it. It is clear that the character and value of all human acts are shown with precision by the motives which determine them.

This is shown by daily experience, for we judge two acts differently if we know that the motives which prompted them are different. But the innovation which I have introduced on the theory of determinative motives consists, above all, in this, that it is a substitution of a qualitative criterion of the anti-sociality or anti-juridicity of determinative motives of action, or of their sociality or juridicity in place of the quantitative criterion to which the classical school has always held in its study of the relations between emotions (in which I include passions more or less vehement) and crime.[1] Social defensive reaction is advanced against any act to the degree that this act (as we have seen in considering natural crimes) is an attack on social conditions, that is to say, to the extent that it is anti-social.

But the anti-sociality of an act does not consist in its exterior materiality, but in the sentiment which has inspired and the motive which has determined it. The criterion, therefore, to fit a special form of punishment to each case lies in the social or anti-social quality of determinative motives, just as the fundamental criterion to distinguish atavistic from evolutive criminality lies in the quality of such motives.

§ 280. Criticisms of Determinative Motives.

Certain criticisms of the criterion of determinative motives, however, have been made, and we must answer them clearly and precisely. It has been claimed that the distinction between social and anti-social, legitimate and illegitimate, moral and immoral, juridical and anti-juridical motives is too vague to be taken as a method of judging human action.

[1] So, for example, even to-day, *Van Buri*, in "Questioni d'imputabilità" in the "Rivista penale" (April, 1898), p. 338, repeats against this theory the quantitative objection that "the slightest motive can be very serious, from the moment that it becomes a serious fact," without seeing my qualitative distinction of motives.

Magri,[1] accepting the criterion of motives, and replying to this criticism, says that anti-juridical motives are those "which tend to hinder or deny the affirmation of social unities." But it is more exact and complete to say that anti-social motives are those which are contrary to the conditions of social existence at a given historical moment for a given collective group. This definition shows that a motive which is anti-social in civilization would not be anti-social in a savage tribe. For example, the killing of relations because of their old age, the killing of a child because it happens to be the third we consider murders; but, on the contrary, they are social duties in the Island of Sumatra and in Australia, where the scarcity of the means of subsistence imposes, because of the different conditions of social existence, entirely different rules of morality and law.[2]

A graver criticism has been formulated by Fioretti, who advances the impossibility of considering conscious motives of action as an absolute criterion of imputability.[3] But these objections, although exact in themselves as sociological observations, are, however, of no avail against the criterion of determinative motives, because, in the first place, he has reference to habitual and daily acts which we effect almost automatically, without conscious motive. He may be right as to such indifferent acts, but the deliberation and execution of a crime, no matter how petty it may be, cannot be considered, even in the case of an habitual drunkard, as an act without motive in the sense that it is executed without thought of the reasons which determine it; for in the greater number of cases, he who commits it will expend much thought if only to complete his precautions against discovery. A crime can be committed unconsciously only by an insane delinquent, and his is the single case where the criterion of motives is not applicable.

On the other hand, even if there can be crimes, apart from the habitual acts of every day, committed without conscious

[1] *Magri*, "Nuova teorica generale della criminalità" (Pisa, 1891), p. 288.

[2] Thus it is possible to understand how the different phrases, social or anti-social, legitimate or illegitimate, moral or immoral, perverse or not perverse, dishonorable or not dishonorable, ignoble or not ignoble, juridical or anti-juridical motives, by representing different more or less general points of view according to which the motives are thus qualified, are nevertheless all included in conformity or in opposition to the conditions of social existence (either for individuals or for society) such as is generally understood in each age and place.

[3] A. P. (1886), VII, 234.

motives, this fact is not sufficient to destroy the value of the sociological criterion of social punishment. For, even then, when the contrary is not proven, the crime can be considered as determined by the motives which ordinarily accompany it, judged by common experience or determined by the character of the agent which is the other criterion inseparable from that of the motive. The most numerous criticisms of the criterion of determinative motives are those formulated by Dorado Montero,[1] in his excellent and complete essay on "Antropologia criminale in Italia."

These criticisms, however, are based on an incomplete or equivocal appreciation of the principle of determinative motives; for, in the first place, Dorado Montero, like Fioretti before him, takes these motives to be intentional; that is to say, to consist in intellectual elements of deliberation, but he forgets that in sociology motives include all the psychic conditions affecting an agent at a given moment. Consequently, motives connote, as well as intention, the sentiments which, as I have said often, conscious or unconscious, are the fundamental determinatives of human action, and can always be judged by the circumstances surrounding the act and the characteristics of the agent of which they are the manifestation and the most direct and profound effect. A second equivocation lies in disregarding the fact that the criterion of determinative motives is not an abstract and isolated formula, but, on the contrary, is always applied in relation to and conjointly with the character of the delinquent; in other words, at the same time with the criterion of the anthropological category to which the delinquent belongs, fixed by the act in question and his prior acts. For these acts furnish all the means of physio-psychological diagnosis which science has been employing in the study of insane delinquents, and which should be employed for all crimes and all delinquents in a penal procedure governed by positive criteria.

§ 281. Determinative Motives as Applied to Insane Delinquents.

As the criterion of motives cannot be applied as a basis of responsibility or irresponsibility in the acts of insane delinquents, but can only be used as a criterion of fitting the form of social reaction to an anti-social act, it is clear that if a murderer, burglar, or incendiary is affected by a clinical and ordinary form of in-

[1] *Dorato Montero*, "La antropologia criminal in Italia," pp. 32 *et seq.*

sanity, the psychological diagnosis from a point of view of social defense is complete and one has no need of other criteria. In certain cases, however, the determinative motives can be used as symptoms to aid in the diagnosis of the special form of mental illusion, when, for example, they depend upon an hallucination or a fixed idea; and it was with this in mind that I considered "the deliberative moment in cases of insane homicide." For if an insane man causes some one's death in the insane belief that he is defending himself (as happens in paranoia or the delirium of persecution), this fact has no appreciable importance in relation to the defense of society in comparison to the proven insanity, which makes the individual unsuited to social life and dangerous in the highest degree.

A difficulty, however, can be present in the very exceptional case of an insane man who has really acted in self-defense. Then, if the determinative motive can influence the criminal judge, the whole difference would be in the imprisonment of the defendant in an insane asylum or an asylum for the criminal insane, since the previous insanity will necessitate the imprisonment. But this exceptional case is not sufficient to destroy the positive importance of the quality of social and anti-social motives as a criterion applicable to the fitting of a social reaction to an individual act, a criterion which, finally, is the only true and positive reason for impunity in three cases of legal justification — obedience of a command, self-defense and duress.

§ 282. Justification as a Defense.

As is well known, classical criminologists in the case of justification, after having advanced many formulae in order to justify impunity, such as conflict of duties, overpowering of will, or emotional insanity, have finally chosen, as is their habit, the defense of failure of free will. Carrara, however, we must except, because he, in a special monograph, has given the true reason for the "Limits of the special right of punishment." But this failure of free will is only an untenable expedient, because there is no psychological impossibility preventing a man feloniously attacked or in some state of necessity, from preferring to renounce his own right rather than infringe, even justly, the right of another. And it is an untenable expedient for another reason; because it cannot be explained how moral freedom is overcome by fear of an unjust assault, and not to give another example,

by the fury of vengeance. And it is also unsustainable because self-defense is not an excuse, but a justification, and represents nothing more nor less than the exercise of a right. Now the positive school considers it with regard to the criterion of juridical and social motives by which the act is determined.[1] There is no difference between the motives of him who executes a legal sentence or obeys the valid order of a superior, and of him who destroys the right of another in the case of necessity; that is to say, in defense of himself or some third party which he cannot effect otherwise.

§ 283. Difficulty of Proving the Determinative Motives as a Criticism of Them as a Criterion.

Finally, a last objection has been advanced against this criterion of determinative motives, that is, the impossibility of proving them. Our opponents ask how one can go about proving what has really been the motive which determined the agent. It is easy to answer not only that the difficulty of proof in certain cases does not show failure of principle, because, in the juridical and social world, what is not proved does not exist "in jura idem est non esse et non apparere"; but above all, that the proof of determinative motives, drawn from certain of the circumstances of the act and the character of the agent, presents no greater difficulties than are found to-day under the classical theories in proving moral responsibility, the alleged freedom of will or intellect, and the presence or absence of premeditation. But further, with psychological determinism proving the indestructible relation between human acts and their determinative motives, this proof would be more logical and more sure in scientific sociology and daily experience than with the hypothesis of free will and moral responsibility.

§ 284. The Use of Determinative Motives: An Example.

To show by a typical example the application of the criteria employed at the same time (right infringed — determinative motives — anthropological category of the delinquent) we can start out with a man found dead. This fact, by the gravity of the right destroyed or violated, arouses great interest in society, and consequently provokes a corresponding reaction. The first question is whether the man died a natural death or

[1] *Fioretti-Zirboglio*, "La legittima difesa," 2d ed. (Turin, 1894).

was the victim of foul play. In the first case, the fact has no interest for the law, and the social reaction lies in the extra-legal field of sentiment, public opinion, and natural economic consequences. In the second case, the fact has interest for the demonstration of public order and private security, and society reacts for ulterior reasons.

The agent and the manner in which death was caused must be determined. He may have been killed by some act of nature, or he may have been killed by man. In the first case, we are again in the extra-legal order, and the case does not concern our legal studies. In the second case, on the contrary, the fact interests us and leads us to further searches to determine the actor or agent, and having determined that there is a murderer the question is whether he was in normal or pathological sociological condition at the time of his crime, in other words, was he sane or insane. If he was insane, it is enough, as I have explained above, to effect a defensive punishment by an eliminative method; but if he was not affected by insanity, the question arises as to the motives which have led him to commit murder; and under this head the first question is whether the motives were legitimate or illegitimate, social or anti-social.

In the first case, the fact loses its anti-juridical character and becomes one of the number of misfortunes, but not of crimes. But if the motives were anti-social, the act immediately takes on an anti-juridical or criminal character, and we must then determine in what measure they have been anti-social, and, above all, study the murderer and determine the anthropological category to which he belongs. Were the motives eminently anti-social, such as vengeance or lust? Was the murderer a born murderer and incorrigible? For, if he was, it is useless to take time in arguments on his moral culpability or imputability, and eliminative means must be employed. But if the motives were less anti-social — disgrace or jealousy — was the murderer merely dangerous through his stupidity, an occasional delinquent, or one carried away by passion? — then with the aid of all the details of a trial suited to determine the physiognomy of the act and the agent, it will perhaps be sufficient to use reparative means (in the case of a simple fool — or in that of a violent transport of passion in an honest man, the true type of delinquent by passion); or together with the reparative means, repressive means (in the case of the occasional murderer).

§ 285. Criteria Applicable to An Attempt.

The criteria of legal responsibility according to the positive school can thus be applied in the case of a homicide (and the same reasoning is applicable to every other crime committed and consummated by a single agent), but there are two other kinds of examples: first, the case of the non-consummated crime, either an attempt or a failure, committed by a single agent; and second, the case of a crime either consummated or attempted or failing, committed by several persons. Then new criteria must be added to those which we have already given, as new inductions for theories relative to attempt and complicity in which the classical school gave new proofs of its uncertainty and its doctrinairism.

Let us take up, first, the theory of the attempt. Since Romagnosi distinguished a class of abortive crime among criminal acts the classicists have spent their time in building theories on the distinction between a failure and an attempt, finishing by a well-considered conclusion, that it was better for legislators to pay no attention to it. Thus Carrara, who said, that "if a legislator in formulating prohibitions disregards scientific precepts, he is guilty of an abuse of power, and his law is unjust," finally praised the German legislature because, in Article 43 of the Penal Code, it had "entirely abandoned a juridical division of failures"; that is to say, because it "had entirely abandoned" a scientific principle by means of which an abstract truth is recognized, but which "results in practice in unsurmountable difficulties and injustice." The classical school, unfortunately, has gotten lost in the most dangerous tangle. An older writer, a pure classicist,[1] Buccellati, has gone further, and although he accused the positive school of scientific nihilism, he believed it necessary not only in practice, but also in science to destroy completely the theory of attempts. As to the positive school, it upholds, as is well known, the necessity of dealing in the same way with a failure to commit a crime and a consummated crime. In a failure, the criminal has done all that is necessary and all that he could do in order to consummate the crime. Now, if the rationale of social defense has its root in the external act of man, because it is this act alone which violates juridical order, just as it is the delusion alone which proves the insanity of the heredi-

[847] *Bucellati*, "Instituzioni di diritto e procedure penale" (Milan, 1884), §§ 366, 383.

ary insane, it is justified by the temibility of the delinquent; and, consequently, it is clear that in a crime which has failed merely through an accident, this temibility is proved by the facts in the case as clearly as it would have been by the consummated crime.

It is a fact, however, that often the failure of consummation, depending as it does upon the less energetic or less perverse action of the evildoer, can form an indication of a less degree of temibility or offensive power. Just as in daily life the impression is always much more feeble when the material damage is not consummated, so the positive school, after establishing a primary general rule of the assimilation of the failure and consummated crime, decides, with Fioretti, that in order to consider an attempt as a crime, it is necessary for it to excite against a delinquent an individual reaction, which is the necessary precursor of social reaction. Furthermore, it must never be forgotten that an attempt must not be judged in itself or in its abstract relations to the juridical order, as the classical school considers it, but must always be considered as a criterion supplementing that of the determinative motives and of the anthropological category of the delinquent. For an attempt made with insufficient means to carry it out, even if homicidal, has an entirely different social and legal value depending upon whether it is the act of an insane or born-criminal inspired by anti-social motives, or the act of an occasional murderer or one inspired by passion.

§ 286. Criteria Applicable to Complicity.

The theory of complicity has given rise in the classical school to a tangle of abstract distinctions between more or less direct participants in a crime, and has led to absurd conclusions. For example, one who orders a man subject to himself to execute a criminal order is not punished if the servant does not accept or does not execute it, and his penalty is lessened if the servant in his execution of the act is prompted by personal motives. It is sufficient to say that in these cases the general principle, according to the positive school, must be as follows: Since the less dangerous delinquents (occasional or by passion) have a constant psychological character (save in the case of an insane man who commits a crime in a transport of passion) which leads them to act by themselves and without accomplices, while the inverse

can be seen in the acts of the more dangerous delinquents (born and habitual), complicity must therefore, to use the language of the classical theorists, be an aggravating circumstance. At any rate, it must be considered not only as it has been considered up to the present time from the point of view of the more or less efficacious part that each of the conspirators has taken in the criminal act, but by looking upon it as a proof of the distinctive character of the delinquents who must belong to the more dangerous categories. This principle, which I announced, has been developed in a strictly scientific method by Sighele, and I will give only this outline, for this book is not suited for its complete development.[1] The different degrees in the execution of a crime, such as the unequal participation of the accomplices, do not preserve, after the abolition of penal dosimetry, the value of symptoms prompting segregation during a determinate time (with periodical revision of sentence in the case of the more dangerous delinquents) or even complementary criteria to determine in less grave cases the undoing of the harm done.

§ 287. Social Accountibility: Conclusion.

It is sufficient to have shown how the positive school, throwing aside the contested and badly-defined criterion of moral responsibility as the reason of a punitive, or rather, defensive right, not only substitutes a positive criterion superior to subjective mental processes and philosophical precautions — in other words, the criterion of social accountability — but further defines an undeniable base for such a criterion, provided that it is objective (responsive to the needs of life and drawn from facts), upon which to base the scientific organism of the principles of criminal sociology. In these principles, society, defending itself against the individual criminal, will find, on one hand, the necessary means of its own preservation, and, on the other, will see the limits which this necessity itself imposes, so that its rights and those of the individuals will be protected at the same time. Thus it is that the reformed criminal science on one hand avoids a certain confusion, which, obscuring more and more the notions of responsibility, involves legislators and judges in difficulties without solution, but dangerous; and, on the other hand, assures

[1] See *Sighele*, "La teorica positiva della complicità," 2d ed. (Turin, 1894); "La folla delinquente"; *Garofalo*, "Criminalogia," 2d ed., pp. 361 *et seq.*; *Allongi*, "La camorra"; "La Maffia."

to the individual and to society as well, a practical course of true justice.[1]

The last of the objections which are ordinarily made to the new ideas, and the one with which I will end this chapter, is that with our Darwinian mechanism we banish from the defensive department of society all idea of justice. Garofalo[2] answered this objection by saying that the word "justice" is an improper use of language in penal law; but this does not seem to me sufficient. If we mean by justice, as Carrara and the more or less determinative classical criminologists do, a mission delegated to man by the Divinity, or, at least, an ethico-religious mission of weighing good and evil and assigning them a proportionate retribution, then to speak of justice in relation to the function of defending society is not only to commit an impropriety of language, but to introduce a heterogeneous conception. But if justice means to us, as it did to the Romans, "Unicuique suum tribuere"; in other words, if it consists in finding and applying a relation of convention and social utility variable according to time and place, between the dangerous act which has been committed and the most suitable means of hindering its repetition, either by its author or by others, then justice is, and always will be, an essential characteristic of that defensive function, but it will never have an ethico-religious character.

The answer to the claim that the denial of free will renders moral law useless and impossible is that death through sickness does not render the laws of therapeutics useless and impossible; and moral laws exist for those who by their physical or psychical temperament can, or even should adapt themselves to them as to a law of life.[3] Therefore, we can reply to those who say that once moral freedom is excluded, justice cannot seriously be spoken of; that justice in our sense of social justice is the relation between one man and another, between an individual and society, not constant and absolute, but variable and relative and at the same time positive and human. For it would be unjust, that is to say, dangerous and unnecessary from a social point of view to punish him, for example, who in case of self-defense has killed the aggressor, or to imprison an

[1] The eclectic *Saleilles* has repeated this in "L'individualisation de la peine," p. 7. (English translation, Boston, 1911.)

[2] *Garofalo*, "Di un criterio positivo di penalità," p. 70.

[3] *Schiattarella*, "I presupposti del diritto scientifico," Introduction (Palermo, 1883), p. 82.

occasional delinquent in an asylum for the criminal insane, just as it would be to protect ourselves against a homicidal maniac by a fine.[1] This is why we can say that in the system of criminal sociology, the judges really judge the author of the crime, and not in the way that they claim, passing the limits of human justice to measure accurately the intangible degrees of moral responsibility nor to assign such a sum of punishment to such a sum of culpability, but in the positive sense that they seek, above all, facts which prove that the defendant has committed the act, and to establish that degree of social defense that it is best to apply to the criminal. Once more, therefore, it can easily be seen, how deceived they are who accuse us of making an idol of the State and of destroying for its benefit all individual rights. This is not true; but in face of the exaggerated predominance of social rights in the Middle Ages, and of individual rights which subsequently developed in 1789 through a reaction, we try to establish in the criminal field an equilibrium between the rights of an individual who has committed a crime and those of the society of honest men.

Nothing is less justifiable, except as a first and incomplete impression, than to accuse the positive school, as has been done, of despising the rights of men, of making of the delinquent an instrument in the hands of society, and of stating that "the individual is made for the State, and not the State for the individual."[2] Above all, we give to the responsibility of the individual a unique and entirely positive basis; a solidarity — for benefits as for misfortunes, for rights as for duties — between all the associates and the social organism which they compose. On the other hand, we impose upon the collective entity considerable permanent obligations to the advantage of the individuals by giving preëminence to prevention; that is to say, to the amelioration of social environment over violent and easy repression which we measure with particular care by the rules of social justice. I will give once more our real conclusion.

While the Middle Ages saw only the delinquent, and the classical school itself sees only the man, it is necessary, in order to conform to experimental truth to consider delinquent man, placing

[1] For the conception of social justice according to the positive school see *Carelli*, "Crimen morbus," in the "Archiv. di psich." (1887).

[2] *Poletti*, "La persona giuridica nella scienza del diritto penale," Cap. X; *Dorado Mondero*, "L'antropologia criminal in Italia," p. 43.

thus the undeniable rights of man which exist even in the delinquent, and the none the less undeniable rights of honest society menaced by the delinquent.[1] Thus, as Le Gall said in his inaugural address at Lyons: "It is possible to have a higher idea of repressive justice, but we must agree that there is none which is more solid in its principles and more fecund in its results." [2] In conclusion: Penal justice as a defensive department of society and the science which governs this department are always fully justified in their existence, even when free will is denied, although they must change radically in means and in end. This is implicitly recognized in everyday life in the use of punishment for animals or for children in order to change and regulate their future conduct, although every one knows that they are totally without moral freedom. It is just this continual and universal application of punishment and painful reactions against harmful or criminal acts, which gives rise in man, and even to a certain extent in animals, to the idea of responsibility. This idea, as Stuart Mill and many other psychologists with him have said,[3] is nothing but the expectation of the punishment consequent upon a misdeed, an expectation produced in us by past experience of this bond of succession between one fact and another, between the action and its corresponding reaction. And this idea (Spencer says) is transmitted by heredity, and seems anterior not only to all personal experience, but even to all social experience.

[1] *Ferri*, "Da Cesare Beccaria a Francesco Carrara," Prelim. lesson before the University of Pisa, in "Archivio giuridico" (1890), XXIV; fasc. 6, partially republished in "Nuova antologia" (16 September, 1899).

[2] *Le Gall*, "Du droit de punir d'après la science positive" (Lyons, 1885), p. 19.

[3] *Stuart Mill*, "The Philosophy of Hamilton," Chap. XXVI; *Bain*, "The Emotion and the Will," Chap. XV; *Guyau*, "La morale anglaise contemporaine," p. 335; *Spencer, Minzloff*, "Études sur la criminalité," in the "Philosophie positive" (September, December, 1880).

PART IV

PRACTICAL REFORMS

CHAPTER I

INFLUENCE OF THE NEW DATA OF BIOLOGY AND CRIMINAL SOCIOLOGY ON RECENT PENAL LAWS

Parallel penalties aggravating and extenuating circumstances — asylums for the criminal insane, special procedures for delinquent minors — measures against recidivists — reaction against short term imprisonments.

§ 288. Influence of the New Data.

The data of anthropology and criminal statistics and the positivist theory of responsibility based on them, although uncoördinated into a scientific system except by the new school, are too conclusively confirmed by everyday life for their influence not to be already felt, imperfectly it is true, in judicial decisions and legislation. Such data gives the means of radically changing the criteria and the mechanisms of penal justice, and therefore one should not consider "strange," as did Ottolenghi,[1] "the slowness with which the progress of the anthropologico-criminal school operates in legal applications." There is no question (as in the beginnings of the classical school) of engrafting reforms in detail on the old trunk of penal and procedural law. It is necessary to reach a new orientation of public and, therefore, of judicial and legislative consciousness in the manner of viewing crimes and criminals. After that, as we have already seen, the technical legal questions (such as "partial" responsibility, attempts, cumulative offenses, statutes of limitation, appeal, and revision), which weary and divide the metaphysical criminalists, will lose their practical and theoretical importance in a penal justice inspired by the data and inductions of criminal sociology, with its fundamental

[1] *Ottolenghi*, Preface in *Bonanno*, "Il delinquente per passione" (Turin, 1896). And yet he pointed out the reasons for this delay in his preliminary lesson on "Alcuni problemi di antropologia criminale" (Sienna, 1892), alleging it to be, the cult of intangible principles, the lack of practical sense among the Latins and the insufficient pursuit of the biological sciences.

criterion of segregation for an indeterminate period under periodic revision of sentences for the authors of serious misdeeds denoting atavistic criminality.

Nevertheless, the infiltration and applications of the new data is already being felt. . . . And as I have already spoken [1] of practical penal jurisprudence in its relation to the new data of criminal sociology, it is not necessary to treat of it again.[2] But it is appropriate to point out that penal legislation, in spite of all the opposition of the scandalized classical school, has been forced to yield, to some extent, to the scientific observation applied to criminals and penal systems. Prius, moreover, recently acknowledged that "the anthropologico-criminal school has had the merit of showing the insufficiency of the fundamental criterion of the Penal Code, based on the conventional and abstract type of criminal." [3] In proof, it suffices to recall a few of the most conspicuous examples. And besides the direct influence of the new data on legislation, there is perceptible an indirect influence noticeable not alone in the restricted field of penal laws. Indeed, the legislators of to-day, impressed, on the one hand, by the revelations of the positivist sciences and especially by those of statistics, biology, ethnography, and anthropology, and, imbued, on the other, with what may be called the prejudice of social and political artificialism, have been afflicted with a veritable law-making mania by the illusory idea that they can and should apply to every newly-observed phenomenon the supposed remedy of a law, a regulation, or for want of something better, an article of the penal code.

Thus (as Spencer said) the citizen is to-day enveloped in a maze of laws, decrees, and regulations, which surround, confine, and strangle him before his birth, and even until after his death.

[1] See P. II, Chap. VII, *ante*.

[2] In the "Bulletin de l'union internationale du droit pénal" (1893, Fasc. IV) and "Scuola positiva" (Sept., 1893), see reports of *Tarde*, *Garofalo*, and *Liszt* "on the influence which modern doctrines have exercised on the fundamental principles of penal law." *Liszt* concluded his report on the "Application de l'anthropologie criminelle" in the "Actes du congrès de Bruxelles" by saying that "the penal legislation of the future must be based on the data of criminal anthropology." For a complete positive criterion see *Franchi's* report to the Congress of Criminal Anthropology at Amsterdam, in "Actes du congrès d'anthropologie criminelle d'Amsterdam" (1901), p. 155. See, also, *Fedozzi*, "Possibile consequenze del positivismo penale nel sistema de diritto penale internazionale," in the "Rivistá italiana di scienze giuridiche" (1897, XXII, Fasc. 11), and prior to him, *Zerboglio*, "Della prescrizione" (Turin, 1893), Chap. III.

[3] *Prius*, "Science pénale et droit positif" (Brussels, 1835).

He is the victim of those whom the witty Bordier called "the gardeners and the orthopedists of society, people who think they can mould it and shape it to their fancy because they have no knowledge of the naturalness of social laws and phenomena." [1] Moreover, even outside of criminal sociology, there is the same tendency in every part of social life: nothing but classical doctrinairism is found in the political, economic, and juridical sciences, — nothing but empiricism in the laws. And this is why, in our special domain, the practical defects and daily impotence of the present systems of penalty and procedure, apparent to everybody, are the best allies of positivist science, while they, in turn, by the practical reforms they propose, propagate and confirm their theoretical inductions. On the other hand, the consciousness of what has been called "legislative decadence" is general to-day in all countries even though it be but the transitory effect of this period of contrast between scientific doctrinairism, far removed from the realities of life, and the legislative empiricism which is its consequence.

§ 289. Examples of Influence of New Data.

Coming to the most direct influence of the new data of anthropology and criminal statistics, the first illustration that we find is as follows: In the most recent penal legislations, such as the Dutch Code, there is set forth and applied the idea of reducing imprisonments to two kinds: the one, more rigorous for the more serious and dangerous misdeeds: the other, milder, called simple detention or "surveillance honnête" for transgressions of police regulations, unpremeditated crimes, and other crimes not induced by malevolent passions.[2] The preliminary labors on the Italian Penal Code show that the idea of these two kinds of detentive punishments subject to a difference of criminal impulsions, already existing in the germ in the Sardo-Italian Code of 1859 (reclusion and relegation) had made much progress and even reached a more or less complete application, from the first propositions developed by De Foresta in the Commission of 1866

[1] *Spencer*, "Political Essays"; *Bordier*, "La vie des sociétés," Chap. XVII; *De Greef*, "Introduction à la sociologie" (Brussels, 1889), pp. 316, 317; *Fuld*, "Einfluss der Kriminalstatistik auf Strafgesetzgebung," in "Archiv für Strafrechtswissenschaft" (Berlin, 1885), p. 225.

[2] *Brusa*, "La detenzione semplice o cosidetta custodia onesta in Paesi Bassi," in the "Rivista carceria" (X, Fasc. 8, 9). To the same effect *Pessina*, "Sul secondo quesito del congresso penitenziario di Stocolma," *id.*, pp. 161 *et seq.*

until the first draft of Zanardelli's Code, which gave the judge, in each particular case, the power to give a reclusive sentence when "the character of the criminal deduced from the motives of the crime" [1] indicated perversion, because of the degrading and anti-social character of the motive, or to give a detentive sentence where the motive of the crime was not anti-social. But the praises of the positivists, who put their faith in this provision, led Zanardelli later to take this power away from the judge. Nevertheless, it is quite impolitic doctrinairism to refuse to follow public sentiments of pity and sympathy for the condemned, when the motives are less odious, for example, in the cases of infanticide inspired by honor, duelling, excessive self-defense, not to mention crimes with a political motive.[2]

Another embryonic and indirect recognition of one of the most important conclusions of the positivist school, the distinction between the different categories of criminals, is found in the system adopted by a few foreign codes and proposed in the Italian draft of Mancini, of enumerating certain extenuating and aggravating circumstances common to all crimes. These consist in some of the psychological characteristics of the different types of criminals, for instance, a prior blameless or immoral life, honorable or disgraceful passion, repentance and confession or former conviction. That is, however, an insufficient and purely formal acknowledgment of the real truth, but shows that the ground is being prepared for a serious and systematic application of positivism in legislation. A striking thing in this connection is the substitution of the twofold division of offenses (delicts and contraventions) for the tripartite division (crimes, delicts, and contraventions). Formerly the laws based their provisions on the classification of offenses drawn from the entirely arbitrary and exterior criterion of the penalty attached to them (tripartition), but the necessity is now felt of basing them on what is called "the very character of the offense" (bipartition). A step is made towards reaching the only scientific and practical base — a classification drawn from the character of the offenders, as we shall see further on when

[1] *Zanardelli*, "Relazione sul codice penale" (Rome, 1883), pp. 10–23.

[2] The idea of two parallel penalties has recently been taken up again by *Garçon*, "Sur les peines non déshonorantes," in the "Revue pénitentiaire" (1896), pp. 830 *et seq.* For investigation of this subject by a great number of criminalists, see *id.*, pp. 1099, 1407, and (1897) p. 144. See also, *Saleilles*, "L'individualisation de la peine," pp. 225 *et seq.*

we come to the exposition of our system of social defense.[1] Another evident example of the necessary infiltration of the new ideas into penal legislation is afforded by the establishment of asylums for the criminal insane. These originated and were used in Anglo-Saxon countries (where there is a stronger sense of the practical and where the doctrinairism of criminal theories has less weight). Henceforth, they demand consideration from all law-makers and judges who have lost their bearings between the new data of psychology and criminal psychopathology and the old theory of moral responsibility.

The same significance must be given to the special procedures adopted for juvenile delinquents in France, Belgium, and Holland. These have been substituted for the dishonor of a public trial and the contagious corruption of the prisons.[2] In the same connection, we may point out the laws suggested and applied against the increasingly disquieting growth of habitual criminality. Such criminals, considered from whatsoever standpoint, whether as the effect of congenital tendencies towards crime, as the product of prison corruption and social environment, or in various cases as attributable to both causes, are nevertheless one of the strongest indictments of the penal laws and systems inspired by the classical theories and a real gangrene of the social organism. This also is the meaning and reason of the unanimous reactionary movement every day more marked against cellular systems in general, which I called "one of the aberrations of the nineteenth century," and in particular against the enormous abuse of short term sentences. In the last place, we find a notable example of this influence of new criminological ideas in the proposed law presented to the French Chamber in 1894, by the Deputy Martineau.[3] Blanc, who reviewed it, said, among other things, that "it is necessary to spiritualize the code"; that is to say, to give a greater importance to determinative motives because "the essence of crime does not lie in the material act but in the psychical state of the agent,"

[1] For the manner of directing laws by this principle of "Unequal treatment of unequal men," see *Olivieri*, "De la loi pénale dans ses effets et ses modes d'application au point de vue de l'anthropologie criminelle," in the "Actes du congrès international d'anthropologie criminelle" (Lyons, 1890), p. 511.

[2] See *Rivière*, "Exposé comparatif des méthodes adoptées à l'étranger pour la défense des enfants traduits en justice," in the "Revue pénitentiaire" (May, 1899), p. 766.

[3] *Blanc*, "Une nouvelle conception du délit," N. R. (1 Jan., 1894).

and concludes, that "there are no crimes but only criminals." According to the Martineau plan, the penal code should give a list of criminal acts, but without penalties. But there would be eight degrees of guilt, to which deportation, death, imprisonment for life at hard labor, imprisonment for a term of years at hard labor, confinement for a space exceeding one year, and so on, would correspond. The jury would be asked in what degree the author of the crime was guilty, and the court would apply the corresponding penalty.

This attempt at legislative reform, although useless in itself (for it wavers between the old and the new theories) deserves to be noticed because it is an eloquent sign of the times. But such practical reforms, which, grafted on the old trunk of the classical theories of crime and punishment, represent only empirical and isolated expedients, are also an integral part of the new system of social defense against crime. We have only spoken of them here to give an example of, on one hand, the inevitable and undeniable interest of the new data of criminal sociology on penal laws, and on the other hand, the necessity of abandoning henceforth the timid and sterile practice of expedients and concessions in order that we may not be hampered in undertaking radical reforms of procedure and repressive systems with a free hand, for this procedure and these systems are the vital and rich results of new scientific studies, and should be realized in a more rational, human, and efficacious system of a social defense against crime.[1]

[1] *Dorado*, in "Du droit pénal répressif au droit pénal préventif," D. I. I. S. (Paris, 1899), Vol. V, p. 359, recalls other examples of this indirect influence on recent laws by scientific ideas of criminality, such as provisions against vagabondage, etc. See also *Stoos*, "Der Kampf gegen das Verbrechen" (Besue, 1894).

CHAPTER II

THREE GENERAL PRINCIPLES FOR PROCEDURAL REFORM ACCORDING TO THE POSITIVIST SCHOOL

Equilibrium between individual rights and social guarantees. The proper office of the penal sentence aside from the illusory dose measurement of moral responsibility. Continuity and solidarity between the different practical functions of social defense. Historical reason and illustrations of the first principle. Exaggerations of the doubt in favor of the accused ("in dubio fro reo") in forms of atavistic criminality. Revision of the trial. Pardons and amnesties. Reparation of the damages. Proposals of the positivist school in the individual direction: popular penal action, reparation of judicial mistakes, least quota of criminality.

§ 290. Three General Principles of the Positive School or Procedural Reform.

Beyond the innovation of the theoretical principles, which the experimental study of phenomena introduces into the science of crime and punishment, because of the narrow boundaries which unite philosophical systems, political measures, and criminal theories and procedure, in the realm of fundamental economic social conditions, other horizons are shown by the new data of natural social sciences. If the positive school reduces the practical importance of the penal code to a minimum, it throws a clearer light on the laws of procedure and criminal measures, for the very reason that their object is to take punishment out of the ethereal regions of legislative menace and place it in the practical sphere of the social clinic for protection against the disease of crime. It also creates the necessity of reversing these systems of procedure and repression in order to harmonize them with the new data of criminal sociology. If a study of psycho-physiological laws showing that the little efficiency found in penalties is due not to their severity but to their promptness and certainty (without speaking of their fitness with the personal qualities of the condemned), it is clear that the laws of procedure acquire greater social value. For, upon them alone depends the belief of the probability of an escape from punishment, which is one of the most powerful sociological factors in crime. And the reason that this rule has always remained a dead-letter in practice,

although constantly cited by classical criminologists, can only be explained by the failure of a positive base such as is offered to-day by criminal sociology.

Henceforth, the eloquence of facts, more powerful than syllogistic ingenuity, will probably cause legislators to spend less time on criminal reforms and more time on the reform of courts and prisons. This leads to the belief which I have stated before the Chamber of Deputies, that: "The penal code is a code made for rascals, while a code of penal procedure is made to safeguard honest men who obtain no justice in the courts, and who, however, are not rascals." [1] Thus, the fundamental reason for a punitive department in the State, being henceforth deduced from the need of social protection, with criteria independent of the hypothetical moral liberty of the individual, and with the recognition of the truth that delinquents, who do not possess the unity of an abstract type, must be studied and treated in different ways as the natural factors of the crime committed, shows them to be more or less incapable of adaptation to circumstances. The rules of procedure and prisons must be varied accordingly. The innovations, which the positive school must introduce in the system of procedure, can be considered as depending upon these three general principles:

(A) An equilibrium of right and protection must be established between the individual to be judged and the society which judges, in order to escape the exaggerations of individualism introduced by the classical school, which failed to distinguish between dangerous and not dangerous, atavistic and evolutive delinquents, for the reasons already indicated.

(B) The duty of a criminal judge is not to determine the degree of moral responsibility of a delinquent but his material guilt or physical responsibility, and this once proven, to fix the form of social preservation best suited to the defendant according to the anthropological category to which he belongs.

(C) Continuity and solidarity between the different practical divisions of social defense from the judiciary police to sentence and execution.

§ 291. The Same Subject.

As the last two principles will be developed later, together with a series of practical reforms which depend on them, it is

[1] *Ferri*, "Discorsi parlamentari sul nuovo codice penale" (Naples, 1889), p. 7, in "La negazione del libero arbitrio."

best to take up only the first principle at this point. Naturally, it is a capital rule for our reforms, but it is important from now on to notice its relation to the classical systems of procedure. Just as criminal law from the time of Beccaria has shown, by a continual diminution of punishment, in all its sentences a reaction against the impractical and exaggerated severity of the reprisals in the Middle Ages, so criminal procedure since 1800 has been an analogous reaction against the abuses of the inquisitorial system of the Middle Ages shown by a constant increase in individual guarantees against social power.[1] But further, while we accept in criminal law the advances made by the classical school in the determination of the limits of the balance between the individual and society, still we believe it is necessary to avoid the irrational exaggerations contrary to the supreme necessity of social defense.

So in criminal procedure, while holding to the just guarantees against the predominance of the accusatory system in judicial organization as irrevocable conquests of individual liberty, still it is necessary to effect in this way our mission of balancing the rights of the individual and those of society by remedying possible exaggerations. These exaggerations are due to the fact that the classical school has not distinguished atavistic from evolutive criminality, and has consequently carried into its judgment of all forms of delinquency the extension of individualism, to which the classical criminologists have been led by the historical circumstances of the evolution of the masses, but which, however, should be limited to the evolutive forms of delinquency. The practical mission of the positive school really consists in this, and although it may have first fallen into the contrary exaggeration and considered all delinquents as types of atavistic and anti-human delinquency, it now has reëstablished the equilibrium of individual rights and social needs, admitting the preëminence of individual guarantees in the treatment of evolutive delinquency, and that of the defense of society in the treatment of criminality.

§ 292. Examples of Exaggerated Individualistic Tenets.

Let us take up now some examples of these exaggerations in the individualistic sense, inacceptable in cases of the most incorrigible and dangerous criminals.[2] The presumption of innocence,

[1] *Maury*, "La législation criminelle sous l'ancien régime," R. D. M. (1 September; 15 October, 1877).

[2] To the same effect (but with certain reservations, because of a lack of the distinction made by me between atavic and evolutive delinquency), see the intro-

and with it the most general rule "in dubio pro reo" has certainly a basis of truth, and is in fact obligatory in the preparatory period of a case, that is to say, in the procedure of the district attorney's office, when there are only suppositions or doubts concerning the defendant. This presumption, derived from the necessity of considering every citizen honest until the contrary is proven, has an incontestable positive base, which is that the delinquents (in whose number we consider those who are not discovered) form, in fact, a small minority of men. It should apply, therefore, to the material proof of the deed, that is to say, to the physical participation of an accused who denies being the author of the criminal act. But when it is a question of flagrant crime or of a confessed misdeed, confirmed by other proof, this presumption, which is exclusively in favor of the accused, does not seem to have the same logical or juridical force. It has still less, for example, when the accused is not an occasional delinquent, who has succumbed for the first time, or the alleged author of an occasional misdeed (which, to speak with greater precision, is a case of evolutive delinquency) than when, on the contrary, he is a recidivist, a professional criminal, or when the misdeed in itself, in its motives or the circumstances which surround it, shows a born or insane criminal, and, to be more accurate, a form of atavistic criminality.

The presumption of innocence, illogical, when absolute and employed without distinction, is in fact merely a juridical aphorism, which has strayed far from primitive reality, in which it originated by the process of mummification and degeneration of the "regulae juris," which Salvioli pointed out,[1] and which is only a special case of the ideo-emotional arrest which Ferrero makes the sociological base of the phenomena of symbolism (a process, by which the mark and formula through constant use are substituted for the object and idea, which they primarily contained).[2] This is why the elimina-

duction which *Garofalo* and *Carelli* have written to their book, "Riforma della procedura penale in Italia" (Turin, 1889), which contains a proposal to reform the code of penal procedure according to the principles of the positive school. *Franchi*, on the other hand, developing his criterion of the "Intégration anthropologique de la procédure pénale," places the latter in connection with the opposite investigation. See "Procès pénal et anthropologie criminelle," a report published in the "Actes du deuxième congrés d'anthropologie criminelle," p. 106.

[1] *Salvioli*, "Gli aforismi giuridici," S. P. (15 August, 1871).

[2] *Ferrero*, "I simboli in rapporto alla storia e filosofia del diritto, alla psicologia e alla sociologia" (Turin, 1893).

tion of this illogical presumption in all cases and stages in which it is in actual contradiction to the facts would deprive of all foundation other procedural forms, which are inspired by it, and which are in fact contrary to the clearest reasons of justice and social utility.

What reason is there, for example, after a criminal sentence for some atavistic form of delinquency has been rendered, for prolonging the provisional liberty of the accused during an appeal? Garofalo said with great force, "Fancy what efficacy through intimidation the sentence of a court can have, which, like the lance of Achilles, wounds and cures at the same time? With one hand it condemns, and with the other it permits the absolute freedom of the condemned. The man who has brutally and thoughtlessly struck his neighbor, the jealous lover who has disfigured some young girl, the yeggman who has spread terror through his threats of death, freely and peacefully go back to their homes, after an illusory sentence, which will undergo a long delay, as they know well, because of an appeal, with even a plea for mercy attached. Their victims are defenseless before their very eyes, in their power, and may perhaps have to repent bitterly of having had the useless courage to prosecute. It is not an unknown thing to see atrocious vengeance taken during the slow course of justice, and even when matters do not go to such an extent, the moral sense of the public is outraged by the sight of a recognized and declared criminal, following the even tenor of his way, side by side with his victim." [1] The restrictions applied by law on the enjoyment of provisional liberty are no protection for social interest, because they are governed by the superficial criterion of the kind of crime, and not by the essential criterion of the class of the delinquent.

§ 293. Equality between Individual Rights and Social Defense — "Non-proven."

No more justifiable or logical is the other rule, that an evenly divided jury results in an acquittal, for this by a vague presumption of innocence belies reality, because, while the vote has not been affirmatively in favor of guilt, it certainly has not been in favor of innocence. On this point, different rules of procedure should be made for different categories of delinquents. Under this head, as under the head of provisional liberty, the system

[1] *Garofalo*, "Ciò che dovrebbe essere un giuridizio penale," A. P. III, 1.

actually employed in regard to occasional delinquents or those by passion, who up to that time had been honest (evolutive delinquency, so recognized by experts, who should always, as we shall see, take part in the preparation and trial of a criminal), should be used, but it should not be used in the case of born-criminals or recidivists, that is to say, in cases of atavic delinquency. In regard to such cases, I made a proposition in the first Italian edition of this work which seemed sacrilegious to those who are subservient to "a priori" maxims. It was to allow the jury to give other verdicts than acquittal or condemnation. In Scotland, where, however, the jury, as in America and England answers only one question, "Is the accused guilty or not guilty," the verdict can also be "Not proven." This system was also followed by the Romans, who had three verdicts, "absolvo," "condemno," and "non licet." Tarde,[1] approving the sentence and verdict of "non constat," wrote with justice that without permitting this national way of expressing doubt, the "no condemnability" would vary with every judge; so that according to humors, habits, conventions and the gravity of the penalty, in a manner differing with different judges and juries, doubt would be resolved sometimes by conviction and sometimes by acquittal, without there ever being any certainty.

§ 294. Equality between Individual Rights and Protection of Society: The State's Right to Appeal.

Seeking for more satisfactory examples of the equilibrium between individual and social rights in the matter of procedure, such as the positive school demands, we can point out the rule by which in a case where an appeal has been taken by the accused alone, the penalty cannot be increased. If, however, it is clear that the appeal is based upon the correction of possible errors committed by the judges of a lower court, and if this correction can, as regards the penal measure, result in an augmentation or diminution, the exclusion of the possibility of an alteration in favor of the condemned who brings the appeal is evidently illogical. A rule analogous to the preceding is that it does not allow a reversal in the case of an acquittal. Even writers, whom one cannot accuse of sentimentalism, do not admit of a revision

[1] *Tarde*, "La philosophie pénale," p. 450 (English translation, Boston, 1912). See also *Carnevale*, "Certezza e dubbio," in the "Rivista penale" (June, 1892); *Dorado*, "Problemas de derecho penal," pp. 268 *et seq.*

of sentence to the harm of the accused. Casorati declares that it is "bristling with difficulties and contrary to the fundamental principles of penal law." [1] The last consideration reduces the question to its most comprehensive and just terms. The prohibition of the revision against the individual is the consequence of the system which we desire to destroy. It considers the guilty, even after trial and sentence, as persecuted victims, whose protection one must insure at all cost. If this is true in political prosecutions, it has no weight in the trial of atavic delinquents. The reversal of judgments in favor of the accused is a logical and necessary correlative to the similar remedy accorded to the condemned. The accused may have profited by false witnesses, false expert testimony, forgery, intimidation, corruption, or other illegal means, and it is intolerable that he should tranquilly enjoy the fruits of such a crime. He may have been acquitted because the indictment (not the result of omniscience, and drawn up by information furnished by the prosecutor) was drawn up without access to a single document of weight. An accused unjustly acquitted, can, in the teeth of the jury and the judge who have taken the matter up on motion for a new trial, cynically declare his guilt without fear of further prosecution.[2]

§ 295. Equality between Individual Rights and Social Protection: Pardons.

The abuse of pardons afforded to individuals condemned for serious crimes can be criticised as Lombroso criticised it.[3] "Malefactors," says Bentham, "in their ecstasies of crime precipitate themselves on cities as wolves on flocks after a long fast." Another consequence of the principle of equality between protection accorded to the individual who commits crime and those of honest society is the rigorous obligation and assured

[1] *Casorati*, "Il processo penale" (Milan, 1881), p. 432.

[2] *Magno*, "Della revisione dei processi penali," A. P. (1884, V. fasc. 2), p. 264. The Austrian and German codes (358 *et seq.*) already permitted revision in the cases of suspects. For individualistic exaggerations introduced in the contrary by the classical school in France, Deputy Boysset presented in December, 1884, a proposal of revision for cases of condemnation. As to these *Bertheau* said, in "Réformes pratiques" (Paris, 1886), p. 34, that, should the proposal become law the well-known maxim would have to be changed to "res adjudicata pro errore habetur." It is clear, on the contrary (and this is my stand), that the only remedy is not to admit an absolute presumption of "res adjudicata" in any conviction, provided that the periodic revision of sentences is, as will be shown at a later point, to be one of the bases of penal justice considered only as a function of preservative clinic.

[3] *Lombroso*, "L'incremento del delitto in Italia," p. 127.

execution of reparation in damage caused by the crime to innocent parties. This obligation, which to-day figures only as an ideal hope and an ineffectual clause in penal sentence, must be more seriously granted to those who have suffered damage. In the last place, to obtain a greater equilibrium between individual and social rights we can mention the institution of penal prescription which forms an immunity for all criminals, while in justice it should only be admissible for occasional delinquents or those through passion, and forms of evolutive delinquency, above all as far as the prescription of condemnation is concerned.[1]

On the other hand, the positive school, for that very reason, believes that it makes for a more rational equality between individual and social rights. It not only takes the part of society against the individual, but also that of the latter against the former. In the first place, the other propositions, that it makes, to show the characteristics which guarantee the social duty of the reparation of wrongs, although directed against individuals who commit crime, are individualistic, because they are not made for the benefit of society as a collective entity, but rather for the individuals who suffer from the crime. This proves that classical individualism is not any more complete than the individualism of the positive school, but that it takes more concern for the delinquent individual considered, through a residuum of the mentality of the days of medieval political barbarism, as a victim of the State. It does not even consider the true victims of the delinquent, who are, however, individuals as well and more worthy of aid and sympathy. We can note three other innovations as principal examples of the aid given by the individual against the classical excess or failure of the social power. Two of them have been noticed by some of the classical criminologists. But in that school they have remained in the state of development of a hoped-for reform, because they are dissonant in the mass of judicial theories. On the contrary, the positive school gives them an entirely new value, as it did to the proposition for asylums for the criminal insane and for substitutes for imprisonment, because it binds them organically to a system of other positive propositions. I allude to popular action for the reparation of errors of imprisonment, and to the reform which will

[1] *Zerboglio*, "Della prescrizione penale" and "Scuola positiva," 1893, p. 369; *De la Grasserie*, "De la suppression d'immunités accordées au coupable," in the "Revue pénitentiaire," May, 1898.

erase from the number of crimes acts which will only be considered thereafter as harm caused by a particular individual, and which would be punished, not by imprisonment, but by what is more effectual, the reparation of the damage done.

The police, like the institution of social defense, treated no longer as a private affair but as a public and social function, answers well to the general exigencies of sociology, which demands a division of labor even in collective organisms, and to the particular demands of criminal sociology, which proves that the social function of defense against crime should be entrusted to a special and distinct department, not to be created henceforth as a necessary institution, even among those nations, for example, the English, who have not yet established it regularly, but who have begun to make use of it by a process of consolidation. Thus the abandonment of the idea of confusing the district-attorney's office with the court of assizes shows the necessity of giving it greater executive independence (which weighs too heavily to-day on the judges and their careers) by giving it a greater individuality and power. And yet the action of the district attorney, above all as now constituted, is insufficient to protect citizens from crime, either through an organic defect of the personnel insufficient in number, or because of the functional faults which Gneist [1] has pointed out, consisting, as it does, in political affiliations, in other words, "in a disposition to favor the party in power," for they, as Gneist himself remarks (and this destroys the objection of Glaser, who denies the possibility of governmental political pressure),[2] have no need in certain cases to exercise a special influence by more special or compromising means. The spirit of preservation, natural to all departments of State, or of the principle of authority, which is a particular aspect of them, is sufficient without any thought or motive less plausible of an interested deference to those whose power controls individual careers. This is why it would be good to add the action of individuals to the action of the public authorities (without, however, substituting it) in order to aid the defensive reaction exercised by the judiciary.[3]

[1] *Gneist*, "Vier Fragen der deutschen Strafprocessordnung" (Berlin, 1874), I, pp. 16 *et seq.* See also *Mario Pagano*, "Della prova," p. 62.

[2] *Glazer*, "Motivi del codice di procedura penale austriaco," cited by *Garofalo* and *Carelli* in "Riforma della procedura penale" (Turin, 1889), p. cviii.

[3] The draft of the Hungarian Code of Penal Procedure (December, 1889) allows, besides subsidiary private action (where the district-attorney refuses or abandons a criminal action) and accessory private prosecution, a principal private

§ 296. First Form of Individual Criminal Action.

The exercise of criminal action by individuals can take either of two forms, depending upon whether it is a right of the victim or of all. In relation to the first form, already admitted and regulated by existing laws among all civilized people, there are many necessary reforms, particularly in regard to the right of private complaint without consecutive penal action of which the positive school must necessarily, as Setti says, call for the retraction, and perhaps even abolition.[1] For while this right has been governed up to the present time by laws which consider the juridical and material entity of the crime, it must also depend upon the power of the delinquent, for society is interested in defending itself entirely apart from private complaint against even the authors of slight misdemeanors (atavic delinquency) whether they be insane, born, or habitual. And we can add that the necessity of private prosecution lends itself too easily to bargains between offender and victim, which certainly does not tend to elevate the moral and juridical feeling of the public. On the other hand, this action of the offended citizen must be reformed in the exercise of rights which concern him as an interested party in penal judgment and as a guarantee against the negligence or possible malfeasance of the district-attorney, who, while he is obliged to receive every complaint and denunciation, is (in Italian and French law, though not in Austrian and German law) arbiter of the penal suit, and consequently of all suits in response to individual complaints. But a citizen who believes himself harmed by a misdeed, must he obey this sentence which is not that of a judge? Hence, the idea of a subsidiary accusation on the part of the victim, an idea which, already admitted in Austria and Germany, and in the proposed Hungarian, Belgian, and French codes with variations with which we need not concern ourselves here, represents a true and serious protection for the individual against the social power.

§ 297. Second Form of Individual Criminal Action.

The second form of private accusation lies in the popular action, and is a national tradition among the Latin people, for

action, with essential coöperation by the State, in cases of slander, offenses against honor, petty assaults, and housebreaking.

[1] *Setti*, "L'azione privata e la scuola positiva," R. C. (1888), XVIII, fasc. 5; *Garofalo*, "Criminalogia" (English translation, Boston, 1914).

it is one of the institutions of Roman Law, which, without doubt, was introduced with exaggeration and by force in the civil domain but which desires on the other hand in the criminal domain to be justified by the accusation, which Carrara has formulated, saying with the approbation of the classicists, that the Romans, "giants in civil law, were pygmies in penal law." Rudoph Gneist, with this special point in view, proposed to introduce into penal procedure, popular action against electoral crimes, crimes of the press, attempts against right of assemblage and association, and slander of public officers. But these are not the only cases where contemporary public life can require popular penal action. We will not take up here the practical organization of this institution. It is sufficient to have mentioned it as one of the reforms advanced by the positive school to realize in the penal law a better equilibrium between the rights and protection of individuals and those of society.

§ 298. Reparation to a Man Unjustly Convicted.

Among the principal propositions, which the positive school advances, the second is reparation for the individual unjustly condemned or prosecuted, for the judicial errors committed in the name of society. This reform, like the prior one, finds numerous followers in the classical school, but we cannot but fear that it will remain in the state of a platonic promise; for as it is facilitated by the restriction of prisoners so freely doled out to-day, and by the more frequent use of pecuniary reparation in the form of fines or indemnities, it finds constantly much more favorable conditions, and much greater probabilities of practical realization applied on certain special questions in the repressive system of the positive school. Applied in certain special cases as an exceptional measure since 1600, for example, by the Parliament of Toulouse, and within the last hundred years by the English Parliament, the reparation of judicial errors has been imposed, particularly in France about the year 1700, as a consequence of unjust capital punishment. This led Voltaire and Beccaria to demanded the abolition of the death penalty.

In 1781, the "Société des Arts et Belles-Lettres" of Châlons-sur-Marne proposed the reparation of judicial errors, as a subject of debate and gave the prize for the best pamphlet to Brissot de Warville for his "Le sang innocent vengé." The Cahiers for the Convocation of the States General contain many affidavits in favor

of this reform, which Louis XVI presented to the States General on the eighth day of May, 1788. In 1790, Duport proposed such a law to the Constituent Assembly, which voted against it, however, in February; it was attacked by certain objections, practical ones generally speaking, which every one has been contented to repeat for a century. The Convention, however, decreed special reparation in particular cases, like that of the thousand francs awarded in 1793 to a certain Busset for having been "arbitrarily detained and prosecuted." In 1823 the Société of Châlons-sur-Marne again took up the matter which has since been the subject in France of propositions of legal reform, viz: in 1867, when Richard and Ollivier discussed the revision of process under the amendment presented by Jules Favre, and again in 1883, on the proposition of Deputy Pievre, and in June, 1890, on that of Deputy Reinach, until finally the law of 1895 was passed.[1] Among the writers who have upheld it are Necker, in his monograph on finances in France, Pastoret, Voltaire, Bentham, Merlin, Legraverend, Hélie, Tissot, and above all, Bonneville de Marsangy, in his book on the betterment of criminal law,[2] where, besides this reform, he proposes many others, which we have seen again advanced in the last few years, for the substitution of other punishments for that of imprisonment for a short period. The criminologists who have sustained it are, among others, Carrara, Brusa, Pessina, Geyer, Schwarze, and Prius. More recently, Garofalo defended it in his report on this subject to the Third National Juridical Congress in Florence in September, 1891. As to existing statutes, the reparation of juridical errors — whether limited to those who have been found innocent on appeal, or extended to the accused who are subsequently acquitted — was admitted by the penal codes of Hungary, Mexico, and Brazil, and by the codes of criminal procedure of Norway and Canton of Tessin, and in Switzerland, by the Cantons of Freebourg, Vaud, Neuchatel, Geneva and Bâle-ville and Berne. There are also special laws providing for it in Portugal, Switzerland, Denmark, Austria, Iceland, Belgium, France, and Germany.[3] The juridical principle, that the State should repair the material and moral damage

[1] See the "Scuola positiva" (February, March, 1904) for the present state of German legislation, which adds reparation for the innocent held for trial to that for the innocent arrested. For Italy, in Lucchini's plan, which deals only with the accused not held for trial.

[2] 1864.

[3] 1884, 1886, 1888, 1892, 1893, 1894, 1895, 1898 respectively. The texts of these acts can be found in the "Revue pénitentiaire" (1894), p. 806.

caused by its officials, whether intentional or unintentional, to such citizens as have done nothing to expose themselves to process or condemnation, cannot be seriously questioned.[1] The entire difficulty is reducible to two points, — first, in what cases should the right to such reparation be allowed? And second, by what financial methods can the State fulfill this duty? As to the cases where reparation must be admitted; it seems, first of all, that they should include those where the condemned are found innocent by a reversal of the judgment (with the necessary reforms indicated above in this particular[2]), and those who have been prosecuted unjustly. In the latter case, indemnity should be restricted to those who have been released or acquitted because the act was not a crime, or because they had taken no part in the crime. Hence, another confirmation of the necessity of the verdict of "not proven, in order to distinguish true acquittals from those which are doubtful."

§ 299. Abolition of Certain Crimes.

The third proposition, which the positive school advances on its own initiative, but which, on the one hand, is connected in the spirit moving it with the provisions of the penal code, and the new theory and doctrine of the reparation of damages (with which we shall deal later on, and which Puglia[3] was among the first to adopt) is to abolish from the number of crimes a large series of acts committed by occasional delinquents, or committed either through neglect or carelessness by men morally normal, whom Lombroso called "pseudo-criminals," and which entail but little damage. In these cases, the crime not having been committed by malice, or the damage, public or private, being very slight (either because of the act itself or because of the character of the agent, not a dangerous man), it is iniquitous and, in fact, useless to inflict an imprisonment which arouses in the public conscience pity for the condemned, or inflicts upon

[1] Among the few opponents, see *Worms*, "De l'état au regard des erreurs judiciaires" ("Extrait des 'Comptes rendus de l'académie des sciences morales et politiques'") (Paris, 1884), and in a less positive manner, *Camoin de Vence*, "Des indemnités aux victimes d'erreur judiciaire," in the "Revue pénitentiaire" (March, 1884). *Contra*, see, above all, the monograph, which has already been cited, "De l'indemnité," by *Pascaud* (Paris, 1884).

[2] *Ante.*

[3] *Puglia*, "La psico-fisiologia e l'avvenire della scienza penale," A. P. (1832), and M. D. P. (Naples, 1890), I, 132.

him a laughable detention of a day or so, lacking, of course, all remedial effect.

These acts should be withdrawn from the scope of penal code and become simply torts, or quasi-torts. In other words, they should entail an exact and rigorous reparation in damages; a punishment not as illusory as a detention for a day or so; not repugnant to public conscience, and productive of a more efficacious effect upon the authors of the damage who would thus be made to actually repair the harm that they had done. The theory of absolute justice cannot concern itself with such trivial offenses, which, however, constitute two-thirds of the every-day life of justice in the law courts; because in the latter slander or the theft of an apple must be met with its proportionate punishment as well as a murder. But the positive school, which, on the contrary, regards the real conditions of social life, deals with the necessity of disembarrassing codes, courts, and jails of these infinitely petty matters of the criminal world by suppressing detention for what Venturi and Turati happily called the "minimum quota of delinquency," and by freeing it from prohibitions and penalties which imprison without pity those who commit slight misdemeanors and delinquencies, while remaining only too elastic for the most dangerous malefactors.

CHAPTER III

THE MACHINERY OF PENAL JUSTICE AND ITS ACTUAL CHARACTER

The proper duty of a penal judgment — the preparation of the case (judicial police) — pleadings (accusation and defense) — trial (the judge and jury). The criminal clinic —civil and criminal judges — intelligence and independence of judges — their election — powers of the judge.

§ 300. The Characteristics of Penal Judgment.

The immense social mechanism which is called penal justice is divided into the judiciary police, the judges, and a jury, the judgment, the execution, and the aftermath of the execution. Before dissecting the organization according to the scientific conception of the criminal phenomenon as a symptom of individual or social pathology, as we propose to do, it will be well to state the general actual characteristics, which are the product, on the one hand, of the double function exercised by penal justice as social defense (against atavic criminality) and as class defense (against evolutive criminality), and on the other hand, of the ethico-juridical spirit of distributing justice, which the classical doctrine of crimes and penalties has left to the criminal courts as a survival of its primitive and barbarous phases, let us take up the characteristics in turn.

§ 301. Impersonality.

The criminalists, law-makers, and judges consider that the cycle of justice has three terms: the crime, the judgment, and the penalty. The classical school does not recognize the delinquent, who is, however, both the initial and final term of social defense against criminality. In the same way, the doctors of days gone by recognized only three objects for study: the malady, the diagnosis, and the treatment, — and forgot entirely the initial term, the patient. Except in certain exceptional circumstances, the delinquent is most in evidence and, therefore, recognized by the codes (for example, in cases where he is a minor, a deaf mute, insane, drunk, or swayed by passion). Neither the laws nor the judges are concerned with

the bio-psychic and social personality of the accused; and yet, it is in this that the natural determinism of the crime is found operative. Consequently therein the criterion lies, which makes it possible to prevent its repetition by the same individual, and to attain his readaptation, if it is possible, to social life. In fact, the defendant is only a living manikin on which the judge fastens a number of a certain statute, considering only a penal dose which should be proportionate to the moral fault that he believes is found in the accused. He becomes simply a numbered automaton during the execution of his penalty, thus presenting the absurd and demoralizing contrast of the person who lives, breathes, and has his being, while lost and submerged in the nameless crowd of convicts. Hence the problem of the individual — legislative, judicial, and administrative — of punishment, which, in an excessive reaction against this impersonality of existing penal justice, represents an ideal impossible of realization until the entire attitude of social defense against crime shall be radically changed, but which certainly shows — like the individual treatment for every sick or insane patient — the end which must be reached through the anthropological classification of the diverse types of delinquents.

§ 302. Characteristics of Penal Judgment: Judicial License.

Under the confused mass of the thousand formalities, some essential, some superfluous, many often absurd, and in spite of the good intentions of the representative of justice, the spirit of penal justice, from the moment when the police begins its examination until the execution of the judgment, both in the material guilt of the accused (as the author of the criminal act) and in the dosimetry of his moral culpability, judicial license is always active. By judicial license is meant a certain inspiration, which is seen not only in the initiative of the district-attorney's office, but also in the monosyllabic verdict of the jury and the sentence of the judge based on reasons for the sentence (a procedural guarantee, against which, in the year 1800, despite the eloquence of Filangieri, the judges, rebellious at any innovation, raised great objection) simply adding a more or less laconic and stereotyped argument to the positive period of the sentence already formulated in the mind of the judge by "intimate convictions." For every one knows that not only verdicts, but also sentences are more often than not determined by reasons not

brought out in the arguments before the court, and which are found in some secondary, lateral, and unforeseen circumstance, and are not formulated in the statutes or shown by the pleadings. This is seen in the abominable habit which has been formed, at least among Italian judges, of giving after the argument only the dispositive part of the sentence, and developing the reasons some days later in suiting them to the reasons for new trial or appeal which have been offered by the defendant, in order to render them ineffective.

Thus it is that in the normal procedure of English courts the judges (who in other matters are the best in Europe) pronounce their sentences without giving their reasons, or, at least, without inscribing them, and they dictate them to the court clerk only when required to do so by the defendant or his counsel. Thus, entirely apart from political influences, which exert a direct or indirect influence on penal justice, especially when class interests are involved, the old dictum "habent sua sidera lites" is true, although we must, in our day, substitute for the fatal influence of the planets another influence superior to the ill-will and good intentions of the judges — the orientation of penal justice. For this, in the examination of material proofs, has no guide other than the empiric inspiration of intimate conviction and, to measure responsibility, it is related only to a proportion between punishment and chastisement, between crime and penalty, which is, in fact, a false convention, because no criminalist, legislator, or judge has ever been able to fix the absolute criterion of this proportion, which has been declared impossible of realization (apart from arbitrary and sentimental impressions leading to declarations that a penalty is too severe or too slight) by criminalists themselves, when they are sincere, as for example, by Conforti, Ellero, and Antisa. Penal justice is to-day, in this regard, in the same primitive and empiric period as the empiric medicine of savage humanity, or of the ignorant classes, when the diagnosis of the malady is confined to the prophetic inspiration of the doctor, who is, at the same time, sorcerer and priest, and where the treatment of the patient is looked upon as the exorcism of evil spirits which his sins have attracted to his body. Hence, in penal justice, a scientific diagnosis, founded on the study of the bio-social personality of the criminal and a positive therapeusis, consisting in measures useful to his social readaptation, must be taken up and followed.

§ 303. Characteristics of Penal Judgments: Lack of Organization.

In place of continuity and solidarity in regard to the single end to be attained — social defense from the disease of crime — there is the most complete and absurd lack of organization in the machinery of penal justice. Once a crime has been discovered, the judicial police acts on its own account, and, until it has put in the hands of the committing magistrate the sum of material proofs (against persons unknown, or the supposed author of the crime), it does not concern itself with what will be the consequence of its hypotheses, researches, and "ex parte" proofs, except, perhaps, in some notorious case which excites the curiosity or conceit of the officers charged with the preliminary investigations. As a distinct department, the judicial police works alone and apart, without any relation of organic continuity with the other bureaus through which the person of a delinquent, hypothetical, or proved, must pass for disposition. It is the same with the committing magistrates, who, apart from the question of the vast amount of daily work as well as of the negligence and carelessness in the choice of personnel, have only time to go over the skeleton of proof and suppositions given to them by the judicial police, and to review and transmit it, in turn, to the trial judges.

The latter are forthwith influenced by the presumptions of the written case and the results of the oral debates. They, too, are condemned to uphold the representatives of the judiciary police, whom the district-attorney has summoned as witnesses, without a thought that their depositions lack the first condition of credibility, which the classical doctrines themselves established for every witness (that is to say, disinterestedness). For these agents are always personally interested in the case, if only through professional pride and the exigencies of their profession, without considering the origin of the scaffold of suppositions, inductions, and interpretations of facts, and, what is worse, without considering whether they have a personal interest, as in cases of resistance to the police, where the witness and victim are the same. But over and above all this, as soon as the judge or jury has pronounced the verdict of guilty, or not guilty, according to intimate convictions, there is no further knowledge of the effects of the sentence. The person whom he has judged is lost in the vast arena of the outside world, or of the prison, and, save in exceptional notorious cases, the judge

is ignorant whether the acquitted has later proved by his conduct that he deserved the favorable interpretations given to the facts for or against him, or if the condemned has been found, in paying his penalty, worthy of mercy or of the inexorable punishment which has overtaken him at the fugitive moment when he has passed, more shadow than man, before the kinetoscopic penal justice. During the execution of his penalty the administration of the penitentiary can know nothing of the physical and moral person of the numbered automaton who swells the total on the list of entries and discharges. The number of the statute affixed by the judge to the shoulder of this living manikin is always the only document which tells the jailer of the personality of the condemned. On the morrow of his discharge, not one among those who have carried out the condemnation is concerned, or, if he would, could be concerned, with the effects that the punishment undergone has produced on the person of the condemned, or what aptitudes it has given or taken away from his capability for readaptation to a social life. Of course, I do not speak of the cases where police surveillance, increasing the sentence of imprisonment, again takes the freed convict in its redoubtable hands and (entirely apart from the ill-will of the police officer who, either through choice or through the abuse of discretion in making appointment, is not trained to his duty) fatally draws him back forever in the lamentable circle of recidivity and chronic and habitual delinquency.

The result of all this is, that while the elementary rule of life, constant and inexorable as it is, forces every man to learn by the consequences of his acts to direct, discipline, and improve his conduct, the machinery of penal justice or the officials who control it act each for himself without knowledge and without being able to regulate the good or bad results of their own initiative and activity. It is as if the superintendent of a hospital undertook to direct, by chance, every patient to such or such a ward, diagnosing him by intimate conviction and general appearance; as if, within the hospital, the internes, doctors, and surgeons took charge of the patients, each applying his own syecial treatment and limited by his own knowledge, without concerning himself with what his predecessor had done or with what would become of the patient when he had passed from his hands into those of others; without any unity of diagnosis and treatment deduced from the conditions of the patient, as a guide to cure those who left the establishment.

§ 304. Characteristics of Penal Judgments: Their Impotence.

Furthermore, the actual organization of penal justice, presenting these characteristics to a greater or less degree in all civilized countries, shows no result save the powerlessness of this same justice to remedy criminality. Just as such disorder, as we have represented in the hospital, could have no other result than excessive and increasing mortality from which only a small number of subjects endowed with exceptional organic vigor or extraordinary constitution would escape, so a similar disorder and lack of organization in penal justice can result only in the impotency of social defense against criminality. The only individuals who escape it or its effects are those who are favored by particular personal or social conditions; while, as we have seen, delinquency increases with an obstinate persistence, or grows more poisonous through the progress of recidivity. This is the reason that criminal statistics show (apart from real criminality, that is to say, the number of crimes committed) a difference of sixty-five per cent. between known criminality (crimes discovered and unpunished) and legal criminality (of which the authors are known and punished). To this number we must add the more or less scandalous failures of punishment, due, as far as a certain number of crimes and criminals are concerned, to the intervention of the interests of the dominant class in the administration of penal justice. This justice is not only powerless to defend society against delinquents, but even to protect their victims.

Reparation for the damage done by crime is to-day a mere formula added to the sentence of imprisonment and, to be of any serious effect, it must be taken before a civil court with the interminable and costly delay of such a suit. The State, on the contrary, pays the price of its negligence and impotency, since, while demanding a tax from honest citizens for protecting them from crime through the services of the police and penal courts, it ends, when it has not foreseen the crime in time to stop it, by still paying for its negligence to the delinquents in the form of punishments and awards. And this is why — in the face of this organic powerlessness of penal justice, a necessary consequence of its false moral basis and complete practical disorganization which renders the good will of its functionaries useless — we find such phenomena of sickness and decay as private detective agencies (Pinkerton), which often exceed all bounds in their efforts to give

satisfaction to their employers, lynchings, subsidized robbery by large concerns in order to protect themselves against petty thefts and, finally, the existence of bandits.[1] There are, therefore, not only theoretical reasons based on the scientific study of crime, but also practical reasons of daily experience, requiring a new basis for the administration of penal justice in its different departments and its discarding of empiricism and the spirit of expiation and vengeance, with which it is still debased and paralyzed, in order that it may be organized and governed according to the experimental data of criminal anthropology and sociology.

§ 305. Proper Duty of a Penal Judgment.

The reforms which the positive school proposes in penal judgment are one with the fundamental principle already established.[2] The social punitive function, lacking entirely the ethical character of an expiation for the fault by chastisement and having only the social character, a defensive dynamic, a penal judgment, after the material culpability of the accused has once been proved, far from being measured by the illusive moral responsibility of the delinquent, must first be determined by the anthropological category to which he belongs, and then by the degree of social temibility and readaptability that he presents. The first and fundamental inquiry in a penal case under the new scientific principles would consist, therefore, in proving whether the accused is the author of the crime alleged, and in determining the surroundings and circumstances of the act. Here, as is the case today, the arguments between the prosecution and the defense would take place. This would be the first condition of every judgment.

If the causal relation between the agent and the act were proved, then, as I have said, the accused would either show that the motives which led him to this act were legitimate and thus establish the only case, according to our opinion, in which he could demand an acquittal, or else the determinate motives would be proven anti-social or anti-juridical. There would be no more fantastic and often grotesque duels in which an acquittal is sought, no matter what the psychologic or psychopathologic conditions. Only one question would remain: To what anthropological category does the accused belong? Conse-

[1] For examples, Tiburzi in Tuscany and Varsalona in Sicily.
[2] See P. III, *ante*.

quently, at this point, a new possible argument between the prosecution and the defense would arise to establish the personal and real qualities determining whether the delinquent should be held insane, incorrigible from birth, habitual, occasional, or swayed by passion. We may also note that this discussion by the prosecution and defense would be very different from the bouts of eloquence which to-day make criminal trials resemble theatrical representations. There would be no more trickery, no more harangues, no more judgments stolen by prayers for sympathy, but, on the contrary, judgments determined by calm and clear reasoning. There would be no procedural subterfuges which make the declaration of innocence or the suspension of sentence depend rather upon the cleverness of the attorney than on the true facts of the case, and which make the people lose confidence in the administration of justice. There would be instead an absolutely scientific discussion of symptoms presented by the delinquent, the circumstances which preceded, accompanied, and followed the act, and their anthropologico-social significance, followed by a deliberation as to which of all the defensive means would be best fitted and most just in the case before the court. This would result in the diminution as much as is humanly possible of the effect of chance in the criminal courts, where prosecutions to-day amount to mere gambling as to both the delinquent and society. Then, at last, justice would be truly calm and severe, and would be neither a shameful lesson in crime nor a demoralizing spectacle of ignorant judges, aggressive prosecutors, and declamatory advocates, turning every one by force of their intuitions and their personal magnetism, guided by no scientific criterion concerning the only true judicial problem, which must be a living problem of psychology or sociology in the person of the defendant, and not a sophistical and declamatory edifice of complicated rules on crimes considered as abstract juridical entities.[1] Crime would still continue to be submitted to penal justice, even under the positive school; but the fact, in place of being the exclusive preoccupation of the judge, would only be the necessary condition for proceeding against its author, and one symptom, among many others, of his social readaptability according to the anthropological category to which he belongs.

It would be, therefore, the delinquent who, after his crime, would

[1] See on an analogous subject, *Richard*, "La discussion judiciaire et l'état du droit," in the "Revue philosophique" (November, 1894).

be judged, and it would not be the crime against which a penalty was decreed, while the accused was only considered in a secondary manner as the living point of application of a "regula juris," scholastically stated by the judge, and then abandoned in its practical execution to the chance of a thousand circumstances, dilatory or eliminatory, ignored by the judge himself, and entirely foreign to the delinquent and his crime. To gather, discuss, and judge the evidence, as soon as the pretense of measuring the moral culpability of the accused has been eliminated, will be the whole organism of the penal process. Yet, these three acts are less considered by the classical school, which much demands protection, more or less illusory, of procedural forms, and entrusts itself only and completely, through reaction against a system of legal evidence, to the intimate conviction, or, rather, to the instinctive intuition of judges and juries. Penal process, as Berenini said,[1] must retrace the course of the criminal, starting with the exterior fact of the violation of the right, and following causes with regard to the physical relation in order to discover its author, and with regard to the psychological relation in order to determine the motives which he has obeyed, and also his anthropological category. Hence the necessity recognized by the positive school of reopening the question of proof in criminal process in order to give it its true fundamental importance, by systematizing the rules and inductions, not only according to the data of ordinary psychology as a few of the classicists have done (among them Pagano, Bentham, Mittermayer, and Ellero) but also according to the data of criminal anthropology which makes criminal criticism a branch of the ordinary critique of proof.

§ 306. The Phases of Evidence.

In the evolution of the system of evidence, four characteristic phases, which follow more or less accurately the phases of the evolution of punishment, are found: — The primitive phase — where proofs are left entirely to the naïve empiricism of personal impressions and the critique of evidence has few occasions to be exercised, because the vengeance-defense is exercised almost always against a flagrant crime or against the well-known author of the damage. The religious phase — in which the divinity is called upon to intervene to discover the author of a crime which is regarded as an offense against the deity (judgment by ordeal):

[1] *Berenini*, "Azione e istruzione" (Parma, 1888) p. 153.

The legal phase — where the value of divers elements of evidence is fixed by law as well as the necessity of sufficient degree of proof to fix an ordinary or extraordinary penalty. It is in this period that a confession is considered the best evidence and, therefore, all means are employed to obtain it, including torture, without which the judges, enemies of all innovation, state, in reply to Beccaria, "it would be impossible to administer justice because it would not be possible to obtain the confession of the guilty nor a certainty of his fault."

The sentimental phase of intimate conviction — in which the opposite excess is reached by freeing the conscience of the judge and jury of every obligation in relation to the evidence and declaring that "the law does not demand from the jury an account of the means by which they have determined upon conviction" [1] and warning them even "that they failed in their principal duty if, in determining their decision, they considered the penal consequences that it will have for the accused" — a naïve manner of stating that everything is left to the inspiration of their intimate conscience to judge, in the inextricable tangle of evidence, whether or not it shows that the accused is really the author of the crime. From this principle comes the absurd conviction that judges, through their study of law, are preferable to alienists and more competent to judge whether the accused is insane, or his intelligence normal. It is to this phase of proof that we wish to add another — the scientific — represented by expert testimony; that is to say, by the methodic collection and weighing of experimental conclusions from the material circumstances of the crime (physical, mechanical, caligraphical, professional, toxicological, and other proofs) and above all, by individual and social proofs relative to the person of the delinquent (anthropological, psychic, psycho-pathological). Let us give a few examples of this last phase, for each of the three stages of the penal process — the collection of proofs (judicial police and indictment), argument on the evidence (accusation and defense), and consideration of the evidence (juries and judges).

§ 307. Penal Process: Detection of the Criminal; Bertillonage.

In the first it is clear, as I said in my first edition and as Righini, Garofalo, Lombroso, Alonghi, Rossi, among others have repeated, that on the one hand the study of the anthropological factors of

[1] See Italian Penal Code, Art. 498.

crime, by determining the organic and psychic characteristics of the delinquent and the part played by age, sex, civil position, profession, and such in the different kinds of crimes, and, on the other hand, the scientific study of the dangerous classes of society offer to the judiciary police and the members of the district attorney's staff new and surer means for the discovery of the guilty. Tatooing, the lines of the face, and shape of the head, physio-psychological knowledge, new discoveries of sensibility, reflex activity, vascular reaction, and vision, together with many others, make this important series of proofs of personal identity and criminal propensity constantly more easy and complete, and are of great service in avoiding false scents or in making the acquittal or conviction, now usually inspired by a hasty, insufficient, or partial evidence, more just. The enormous number of crimes unpunished because of lack of evidence sufficient to begin or pursue a prosecution is alone enough to show the importance and numberless advantages of this first connection of criminal sociology and procedure, as foretold by Ellero in his criminal critique.[1]

The application of anthropometry to the proof of identity and consequently of recidivity, first made by Bertillon in Paris, and now adopted in most American and European cities, is too well known to require description. It will be enough to note the modifications proposed by Galton and Anfosso, and the collection of anthropometical data in the judiciary department, proposed by Capagnome at the same time as the collection of such data was begun in the army.[2] Anthropometical identifica-

[1] *Ellero*, "Trattati criminali" (Bologne, 1875), pp. 150, 151. Cattaneo, writing of Lauvergne on galley slaves, foretold more than thirty years ago the new direction which penal science and practice would take by adding the study of the delinquent to that of the crime. He was cited by *Magno*, "Il nuovo codice penale e la scuola positiva" (Milan, 1898), p. 17, and by *Lombroso*, "L'antropologia criminale nei pensatori antichi," in the "Rivista scientifica del diritto" (April, 1898).

[2] Simple anthropometrical identification of delinquents is now adopted by many European countries (Germany, England, Russia, Spain, Roumania, and Switzerland), in many parts of the United States and in South America. There is a complete bibliography on the subject. At Paris, where it was inaugurated, it has proved the identity of from five to six hundred recidivists every year since 1885 ("Revue pénitentiaire," 1896, p. 346), with percentage increasing from 10 per cent. in 1888 to 23 per cent. in 1895. *Bertillon*, "Actes du congrès de l'anthropologie criminelle" (Geneva, 1898), p. 64. The Bertillon system has not escaped criticism (See *Severi*, 2d ed. (Milan, 1895), Vol. III, p. 1400), because it deals only with individuals who have attained complete development, that is to say, of over twenty years of age; and thus born delinquents, of precocious development, are

tion of criminals (Bertillonage) was the beginning of a department of scientific police, instituted by Ottolenghi in 1896 as a free course in the University of Siena, subsequently in 1903 made official by a decree of Zanardelli,[1] and compulsory for all members of the police department. In this official course, Ottolenghi, transferred to the University of Rome, as professor of legal medicine, teaches criminal anthropology and psychology, simple Bertillonage and all subjects which have a definite relation with the duty of the police in finding and fixing crimes and delinquents and in watching suspects. In the same way the biographical description of convicts has been reformed by means of criminal psychology and anthropology.

§ 308. Penal Process: Detection of the Criminal; Sphygmography.

Another efficacious instrument in judicial inquiries is the sphygmographic indications of the variation of circulation. Lombroso experimented with this, finding that a man accused of the theft of a gold object at Turin, of which he was innocent, showed no emotion under the sphygmograph, but showed the most lively emotion, when another theft was mentioned, of which he was not suspected, but of which he was subsequently proven guilty, thanks to evidence whose traces were discovered by the sphygmograph.[2] No less eloquent in proving the value of criminal anthropology are the reparation of judicial errors, which it has effected.[3] The sphygmograph is a valuable diagnostic instrument, especially in case of simulated disease. For example, Voisin made sphygmographic experiments on a man who for six years had simulated epileptic attacks in the streets of Paris for the purpose of obtaining alms and escaping military service. Comparing, however, the sphygmographic curves obtained during, before, and after

not dealt with, while certain anthropometric data (for example, stature) can be disguised to a certain extent, and that, therefore, the measurements have a personal coefficient of variation depending upon who takes them. *Galton*, "Finger Prints" (London, 1892), "Fingerprint Directories" (London, 1895), and " Les empreintes digitales," in the "Actes du congrès de l'anthropologie criminelle" (Geneva, 1897), p. 37, proposed fingerprints to the anthropometrical measurement and photograph, because the lines in fingers never vary in one individual and are always different in different individuals. Furthermore, this has been done in China, taking an impress of the whole hand. *Daae*, "Le impronte digitali per la constatazione dell' identita," translated in "Revue pénale suisse" (1894), Vol. IV.

[1] 25 October, 1903.

[2] *Lombroso*, "Polizia scientifica," in "Pazzi ed anomali."

[3] *Rossi*, "Una centuria di criminali" (Turin, 1888), Appendix "Controprova sopra un condannato innocente," p. xiii.

these attacks, suspected and actually simulated, with those furnished by several epileptics, he reached the conclusion that "the curves shown by the imitator have no resemblance to those shown by the several epileptics and resembled those of healthy individuals after violent gesticulations." [1] Yet, in the prosecution of Misdea, where epilepsy was suspected and in fact existed, authorization to make a sphygmographic study was refused, on the grounds that it was not necessary to the needs of justice.[2]

§ 309. Penal Process: Detection of the Criminal; Conclusion.

Hypnotism also can be employed in criminal researches. Of course, its legal conclusion must be carefully circumscribed in order to avoid abuses, until a scientific control of its principal inductions has been attained. But it undeniably offers great aid in collecting evidence. The surest and richest applications in the collecting of proofs, so far — by substituting scientific observation for the more or less happy empirical and professional intuition of the police and magistrates — are offered by the study of the organic and even more of the psychic characteristics of different criminals. In the psychology and psycho-pathology of homicides [3] a long list of symptoms, characterizing born and insane homicides, and those actuated by passion is given. These symptoms deal with their manner of acting before, during, and after the crime. From the mass of these characteristics, according to the predominance of some or others, and from the material circumstances of the crime studied in their psychological attitude (for example, cruelty, ferocity, number of victims, time, place, and instrument), indications can be gathered before the author is known, to guide in the collection, completion, and weighing of evidence. Experience has shown me in my professional practice, through the great efficacy of psychological symptoms,[4] the necessity of teaching them to the police and judiciary as an aid of the technical instruction, of which I will speak at a later point.[5]

[1] *Voisin*, "De l'épilepsie simulée et de son diagnostic par les caractères sphygmographiques du pouls," A. H. P. (April, 1868), reviewed A. M. P. (1869), II, 165; *id.*, "Leçons cliniques sur les maladies mentales et nerveuses," Paris, 1883, p. 610.

[2] *Lombroso*, "Misdea e la nuova scuola penale" (Turin, 1884).

[3] *Ferri*, "L'Omicidio" (Turin, 1895).

[4] *Ferri*, "Provocazione e premeditazione," in the volume "Difese penali e studi di giurisprudenza," p. 436.

[5] *Garnier*, "Nécessité de l'examen psycho-moral de certains prévenus ou accusés pendant l'instruction," A. C. A. C. (Brussels, 1893), p. 163; *Maure*,

This data is not only applicable to the detection of individual criminals.

The enormous value of testimony in the course of criminal evidence and the traditional empirical tests of criminality, applied every day by district-attorneys and judges to all witnesses, considered without distinction or differentiation as an abstract type (like the delinquents themselves) by the classical procedurists, except when certain circumstances exclude a witness under express statutory provision, show the real necessity for the application of the scientific results of psychology and psycho-pathology.[1] The use of technical and experimental tests of human psychology and psycho-pathology in the consideration of testimony will be a much surer guarantee of truth than the formality of an oath, whose abolition the positive school demands, and all the rules and regulations, even when observed with English precision,[2] which constitute only external and, therefore, less sure conditions of veracity. To give a few of the more striking examples — without speaking of the absurd contempt for ordinary tests of credibility, in the case of the police, whose testimony is accepted every day without a thought that they are always directly or indirectly interested parties, without considering such case, what do the courts allow for the influence of auto-suggestion, of suggestion in the case of women, children, and neurasthenics?[3] Yet the tendency of hysterics to calumny and the number of children who lie[4] are an eloquent proof that

"Mesures propres à faire connaître la personalité physiologique, psychologique et morale du prévenu," A. C. A. C. (Geneva, 1897), pp. 120, 133; *Franchi*, "Procès pénal et anthropologie criminelle," A. C. A. C. (Amsterdam, 1901), p. 155.

[1] This was the object of the special study of *Franchi*, "Il principio individualizzatore nell' istruttoria penale" ("Senale positiva," Nov. 1900). See also *Binet*, "Application des 'mental tests' a l'étude de la farce de suggestion produite par les mots," in "la Riv. di scienze biologiche," Aug., Sept. 1898.

[2] *Speyer*, "Les règles de la preuve en droit pénal anglais" (law of evidence), in the "Revue de droit international" (1898), p. 478; "The Criminal Evidence Act of 1898" (*id.*, 1899), p. 79; *Manzini*, "Legge inglese di riforma del diritto di prova," in the "Revue pénale," July, 1899 (Code, Legis., p. 402).

[3] *Binet et Henry*, "La suggestibilité naturelle des enfants," in the R. P. (October, 1894); *Bertillon*, "Suggestion criminelle et faux témoignages," A. C. A. C. (Geneva, 1897), p. 167; *Rouby*, "Les faux témoignages d'une hystérique," A. A. C. (March, 1897), p. 148; *Pugliese*, "Sulla valutazione della prova orale," R. G. (March, 1896), p. 216.

[4] *Bourdin*, "Les enfants menteurs" (Paris, 1883); *Motet*, "Les faux temoignages des enfants" (Paris, 1887); *Picard*, "Introduction au XIX^e^ vol. des pandectes belges" (Brussels, 1890); *Rossier*, "De la valeur des témoignages des enfants" (Lyons, 1893); *Sully*, "Les enfants menteurs," "Revue des Revues,"

biology, psychology, and psycho-pathology, both ordinary and criminal, are and constantly will be more applicable to the laws of evidence. This reform will only be effected when justice becomes a living entity and judges look upon criminals and witnesses as human beings. But apart from these examples which show the capital importance of what Judge Sarrante rightly called "The judicial application of criminal sociology," [1] as far as the collection of evidence is concerned (and incidentally use should be made of stenographs and phonographs for all examinations and depositions) the most urgent practical reform is the placing of experts in every magistrate's office.

Apart from the technical instruction in criminal biology and physiology which is necessary not only for judges but also for magistrates and higher police officials, an expert or a committee of experts in criminal anthropology should be permanently attached to every magistrate's office. Besides the evident advantages which this would give through a prompt anthropological classification of the accused in order to determine whether he was an insane, congenital, or occasional delinquent (while, of course, his act would be juridically classified), the scandal of duplicate expert testimony given by the prosecution and the defense would be avoided. There must be only one board of experts chosen from among doctors having diplomas and having also taken a special course of instruction as medico-legal experts, who would present to the magistrate and judge a single report as the common result of their investigations or in the case of an irreconcilable disagreement between them, — a report which could be reviewed by a superior scientific committee, as is the case in Germany, Austria, and Russia. This report would be binding upon the judges, at least in its technical and essential parts although in every case they would have a right to ask for further information and proofs, which the president of the board would give for his colleagues. Thus the scandals caused by judges, knowing nothing of psychiatric sciences, who subscribe without a moment's hesitation to the opinions of experts in handwriting and chemistry while on the other hand they believe that they are able by aid of simple common sense to form an

Nov. 15, 1895; and "Revue bleue," Feb. 15, 1898, and in the volume, "Études sur l'enfance" (Paris, 1898); *Campolongo*, "Le testimonianze dei fanciulle e degli adolescente" (Naples, 1897).

[1] *Sarrante*, "Les applications judiciaires de la sociologie criminelle," A. C. A. C. (Lyons, 1890), pp. 386 *et seq.* See also *Ottolenghi* and *Rossi*, "Duecento criminali e prostitute," P. III, "Applicazioni pratiche," p. 249.

opinion of the most obscure forms of mental alienation. This pretension, born of a prejudice, one of the results of the old spiritualistic ideas, and upheld by Kant himself, that the consideration of mental diseases is within the sphere of the philosopher rather than the doctor, is reinforced by the necessity of protecting society, because there is a general belief that the admission of mental infirmity and the exclusion of moral liberty would result in the freeing of dangerous delinquents. But this consideration disappears when the basis of social accountability is substituted for that of moral liberty in accordance with positivistic demands.

§ 310. Penal Process: Trial.

Thus far we have dealt with evidence gathered during the preparation of the case. As far as this is concerned we will not exaggerate the dogmatic necessity of complete publicity. We believe, however, in the necessity of the presence of the accused. Now we come to the second stage of the process, that is to say, the argument on the evidence at trial.[1] The attorneys for the prosecution and defense are naturally those who take part in it. And here (for we cannot enter into the detailed questions of procedural reform) the positivist principle of penal judgment is to be applied. As soon as the laws of evidence have been scientifically determined and the anthropologico-criminal opinion of the expert has been made the basis of this argument before the court the long, useless harangues on the moral responsibility of the accused will be eliminated. The arguments will consist in establishing as at present, but in accordance with scientific criteria, the certitude of the material responsibility of the accused. In cases of flagrant delict or confession (and this confession must be confirmed by extensive evidence) it will deal only with the character, the determinative motives, and consequently the anthropological category, of the delinquent in order to determine upon the defensive measures best suited to the conditions of the act and the agent.

[1] In France, the Act of 8th December, 1897, introduced radical innovations in the secret of penal knowledge. *Franchi*, attacking the decided opposition of Garofalo on this subject, took the other stand, which he harmonized with "the anthropological integration of penal knowledge." See "Il principio individualizzatore nell' istruttoria penale," "Scuola positiva" (November, 1890), and "Procès pénal et anthropologie criminelle," A. C. A. C. (Amsterdam, 1901).

§ 311. Penal Process: Public Defenders.

Public prosecutors, like all other attorneys, must, therefore, have a technical knowledge not of the history of law nor of law itself, either Roman or civil, but a thorough knowledge of biology, psychology, and, in a word, of all the natural and social sciences which form the new science of criminal sociology.[1] To obtain this double object of technical learning in the attorneys for the prosecution and defense and an objective and clinical discussion, it will be necessary and logical to change the rôle of criminal lawyer into a public office like that of the commissioner of police, elective and actually guaranteed a real independence both from the executive power and from public opinion. For while it is possible that the civil lawyer can be the representative of a particular interest, for private property is the foundation of family life and of rights, yet the criminal lawyer, with the acquittal of the guilty and the condemnation of the innocent possibly within his power, cannot represent such an interest. Defense and prosecution must both be social functions given to different officers only because it is a mental impossibility for the same man in the same case to give a just consideration to the evidence on both sides.[2] To these advantages, we can add only that such a system will avoid all the tricks of competition by lawyers in the exercise of a private profession, and the crying inequality between the number and ability of the attorneys for the rich and the poor.

§ 312. Penal Process: The Judiciary.

The penal process reaches its practical conclusion in its third phase, the judgment based on the evidence. In spite of the mania for legislation, rampant in all countries, it is clear that the effect of the laws depends upon the quality of the men charged with their application. A bad law applied by good judges will give better results than a law good in theory, but applied by incapable men. Reforms in the penal code are generally con-

[1] *Abadane*, "Le barreau français et la criminologie positif," A. A. C. (March, 1888); *Garofalo* and *Carelli*, "Riforma della procedura penale," Vol. III, "Dei difensori," L. LXXXVII *et seq.*

[2] Thus, the Republic of Venice had "Avogadori del comune" for the prosecution and "avvocati nobili dei prigioni" for the defense, while in Naples and Piedmont there was an "avvocatura dei poveri," which still survives (as a charitable institution) in the avocate of the poor at Alexandrie. "Rivista penale" (May, 1898), p. 520. Defense, as a public department, can form a part of a popular court, as has been proposed by *Lombroso* and *Laschi*.

sidered necessary for the defense of society from crime, but it will be first necessary to obtain a good organization through a proper choice of the personnel, before taking up the technical construction of repressive means, and procedural reforms (which is the honest code), and, lastly, reform in the criminal code (the code of delinquents). On this point there is a marked difference between England, where criminal law, not yet codified, theoretically very imperfect, but administered by excellent judges, is thoroughly satisfactory, and Italy, where, after twenty-five years spent in compiling a code, but with a bench incapable of scientific thought and dependent on the executive power, criminal justice is discredited, vexatious for the honest, and powerless against the guilty. The two supreme conditions for a magistracy capable of its terrible and difficult mission are the scientific capacity and the independence of judges.

§ 313. Penal Process: Scientific Capacity of Judiciary.

As to scientific capacity; the character and element of a penal judgment, according to the positive school, require the judge as well as the magistrate and police, to have a special knowledge and not to rely entirely on common sense. The positive school, therefore, is opposed to the jury system, which represents the exact opposite of special knowledge. There is another radical reform, advanced by Garofalo [1] at the beginning by the positive school and since championed by many others. This is the separation of the criminal and civil judiciary. Only when criminal judges have a special knowledge of anthropological and sociological sciences (as required by the law of the division of labor) will they be able not only to give more accurate judgments, but also to limit the bounds of prosecution and defense, and to appreciate, understand, and apply with greater pertinence the verdicts of medico-legal experts and criminal anthropologists. The practical means of obtaining this radical reform of the magistracy naturally begins with the law-school curriculum, where, after two years' work in common, there should be a separation of those who desire to study civil and private law, and those who wish to follow criminal and public law. The latter should be given much more extensive courses in the social and natural sciences (biology and psychology), both with regard to criminal man and in connection with general sociology.

[1] *Garofalo*, "Ciò che dovrebbe essere un giudizio penale."

Even in the law, students should be admitted to what Ellero called "criminal clinics." They should be required to make scientific visits and give methodical study to delinquents in prisons and asylums for the criminal insane. Tarde proposed such a course and it was approved by the Anthropologico-criminal Congress at Rome, on the motion of Moleschott and Ferri in the following resolution: "The Congress, in accordance with the scientific tendency of criminal anthropology, expresses the hope that prison-wardens, adopting such precaution as may be necessary to ensure discipline and the individual rights of the prisoners in their charge, will admit professors and students, under the direction and upon the responsibility of the professors, of criminal law and legal medicine, for the clinical study of delinquents, preferably as a society for the relief of prisoners and ex-convicts." [1] And there should be a special school for the training of police, similar to that for prison officials. This need has been partially met by the employment of detectives. The duties of committing magistrates should form a special technical course. They should not be chosen, as they now are in Italy, without special qualifications, for financial reasons alone.[2]

§ 314. Penal Process: Independence of the Judiciary.

As to the second capital condition for the radical reform of the judiciary, the complete independence of criminal judges from influence by the executive power must be guaranteed. For now, in spite of the much bruited inviolability of the judiciary, the right of transfer, even among positions of equal official rank, is a very real means of punishment or reward. The independence is much more difficult to insure with the criminal than with the civil judiciary, especially in reference to politico-social crimes. Its guarantees must lie in the organization itself — for despite the belief that human nature does not vary, men give very different results according to the places where they expend their activ-

[1] A. C. A. C., p. 398 — a hope renewed by studies of delinquents in Paris (1889), (Lyons, 1890), p. 204. To the same effect, *Winkler*, "Nécessité d'introduire l'étude d'anthropologie criminelle dans les cliniques psycho-pathologiques pour les étudiants en médecine et en droit," A. C. A. C. (1893), p. 346.

[2] See *Lombroso*, "Sur l'enseignement pénitentiaire" (1890), a report to the prison of St. Petersburg, "L'antropologia criminale e le recenti progresi"; "Le pur recenti scoperte ed applicazioni dell' antropologia criminale" (Turin, 1893); *Gross*, "Ein Kurs über Kriminalistic für die Instruktionsoffiziere," Z. G. S. (1894), XIV, 677. The need of judges, especially in the lower courts, with special technical knowledge, was discussed in "l'Unon intern. de droit pénal" (Linz, 1895).

ity.[1] For such an organization as will insure independence and impartiality, these reforms are needed. First, every judge must bear not only the technical but also the moral and social responsibility of his sentences.[2] The system of "per curiam" judgment seems made expressly to avoid this.

A single judge, on the other hand, following the English system, gives the best guarantees in this respect. It arouses a feeling of responsibility, entails a conscientious study of each case (in place of reading notes on it), and rapidity of decision. The fact constantly observed by the collective psychologist, that the union of several men in circumstances demanding loyalty, sincerity, and personal courage (required in every criminal case) results in a mean inferior to the degree of each component individual, and is a decisive argument in favor of a single judge. The arguments against this are based on prejudice and the desire of every judge to shift his own responsibility. Second, during the period of transition between the actual organization of criminal justice and that of the future clinic for the prevention of crime, the criminal judiciary should be elective, as it is in the United States and in several of the Swiss Cantons. There should be periodical elections, with perhaps, provision against consecutive terms in order to avoid the grave dangers of "professional perversion," or mental habits resulting in an inability to view the world save from a particular angle. By election, partiality and servility, which inevitably exist where the judiciary is a professional career, will be eliminated. They no longer exist in England where the judges, named by the crown,[3] it is true, are few in number, well paid, and chosen from among the most successful lawyers, without possibility of subsequent return to the Bar. Third, elective judges must be subject to an efficacious control, not only by public

[1] The same is true of deportation, military colonization, etc., where the officials are forced into unavoidable abuses. It is useless to defend them by undertaking to employ only men incapable of abuses, for they depend much more on the exceptional conditions of the situation, a power beyond control, than on the malice of men. Good men and bad remain pretty much the same in all surroundings; but they are very rare. The host of mediocre individuals adapt themselves to the conditions of existence, and give, according to circumstances, good or bad results.

[2] *Borciani*, "I giudici" (Emilia, Reggio, 1895); *Bellat*, "Judicial Reform," in the "Westminster Review" (April, 1896); and "Revue des Revues" (1 May, 1896).

[3] *De Noailles*, "Le pouvoir judiciaire aux États-Unis," R. R. (1 August, 1888).

opinion (exercisable by a vote of public censure), but through some disciplinary power, to a certain extent foreign to the judiciary in order that a new form of irresponsible tyranny will be avoided and the people protected from the abuse of judicial power and the latter from the abusive pressure of public opinion.

§ 315. Penal Process: The Qualification of the Judiciary.

Other qualifications besides scientific knowledge and independence are needed for the criminal judiciary. The application of the law to particular cases in the criminal branch is not simply a function of abstract legal logic (as it is generally in civil cases). It is the psychological adaptation of an abstract rule to a living man. For, the criminal judge cannot and should not isolate himself from the surrounding world, to become the "lex loquens" or mouthpiece for the law. As has been said under another heading, the conditions of the agent, the act, and society are the vital and human tests in every criminal case. The laws of the future will be free from every Chinese puzzle of legal dosimetry and will be only general rules without more or less sophistical and abstruse definitions. In them punishability, to use an antiquated term, will depend less upon the juridical factors enumerated in each statute than on the personal qualities, tendencies, and motives of the author of the harmful or dangerous act. In this way, in penal justice, considered as a preservative clinic against criminality, above all, at the moment of weighing the evidence and giving sentence, this old question of the "arbitrary power" of the judge will arise. On this subject, one excess has followed another. "Through reaction against the unlimited power of the judiciary, a legend comes down from the public remonstrances of the Middle Ages, the exaggeration of the well-known aphorism has been reached; 'The best law is that which leaves the least to the judicial decision; the best judge is he who takes the least upon himself.'"

But, if the penal judicial function cannot be exercised, as it now is, by a useless dosimetric inquiry into the moral responsibility of the delinquent, encumbered by all the complicated rules concerning attempt, complicity, and misdemeanors committed in the attempt at a felony, in other words, if criminal law deals with the crime and not the criminal delinquent, and if he is but a secondary consideration, as the point of algebraic application of legal rules, then it is certain that the arbitrary power

of the judge must be enclosed by the more or less efficacious barriers of a statute, which, in an Oriental system of degrees of punishment, has to-day resulted in a logarithmic system of fractions with minutely graded interest and has transformed the judge into an accountant. But if a penal judgment is what it should be, a bio-psychological examination of the accused, relegating the crime, as the condition of punishability, to the second place, and regarding the man who was its author, as of chief importance, then, clearly, criminal law should be controlled by a few general rules on the means of defense in different forms of social sanction and the constituent elements of each crime, so that the judge may preserve greater freedom, justified by his scientific capacity, in judging the man brought before him.

In a rational organization of the preservative clinic against criminality, however, the position of the judge will lose much of the excessive and abusive importance, which it now enjoys, thanks to the absurd principle that "res judicata pro veritate habetur," which simply gives to judges (born of woman, however) the gift of infallibility, while a single judicial error proves the absurdity of the whole proposition. For not only will means of prophylaxis and hygiene have greater development and importance in the social function of defense against criminality, as we understand it, than repressive machinery after the commission of the wrong, but in the latter case the penal judgment will not be final, for there will be periodic revision of sentences. As we shall consider at a later point, the defensive means against a crime already committed will be reduced to reparation in damages for the smaller crimes committed by criminals who are a source of little danger to society and are adaptable to social life, and to segregation for an indeterminate period in the case of dangerous criminals, more or less readaptable. The execution of the latter sentence will not be unsupervised as to-day, but will be subject to periodic revision by the judge and other officials, for the purpose of deciding when the condemned will be readapted to the freedom of civil life. On one point the arbitrary power of the judge is not admissible. It is in regard to procedure, which forms a real guarantee against possible errors and surprises for the citizen who appears in the courts — for, as has already been said, procedural law is the law of the honest, who may by mistake or malice be suspected of crime, while penal law is the law of the

dishonest, that is to say, it is applied only to those who are proved dishonest. This proves that the classical individualists are wrong in accusing the positive school of wanting to destroy the guarantees of personal liberty in penal procedure. As far as the real and essential guarantees (and not the Byzantine nullities, valueless for individual protection and useful only as a means of delay) are concerned, we demand and require that the liberty of every citizen be assured. But, society, as I have already said, must be equally protected.

CHAPTER IV

THE JURY

Advantages and disadvantages of the jury as a political institution. The jury from the standpoint of psychology and sociology. Abolition of the jury for the common crimes. The most urgent reforms.

§ 316. Positivistic Abolition of the Jury System.

KNOWLEDGE sufficiently scientific — such is the principle which must govern this fundamental reform of the penal judiciary and which entails the abolition of the jury system. Its suppression in the case of common crimes, together with a better choice of jurors, less subjected to influences, is the last of the principal reforms, which the positive school at present demands as essential to true penal justice.

§ 317. Arguments in Favor of the Jury System.

The principles of liberty are invoked to preserve the jury systems. But with a scientific question, such as penal justice, no democratic or aristocratic ideal can be involved; the test is scientific capacity.[1] Theodore Jouffroy, present at a lecture against

[1] It is of interest to recall that in the letters of Carrara, published by his son at Lucca, in May, 1891, at the unveiling of his monument, there is the following statement, "I expressed as early as 1841 my feeling on the jury in the 'Annales della giurisprudenza toscana,' where I said that criminal justice was becoming a lottery. The scales had been taken from the hands of justice to substitute an urn. That, I think, is the radical vice of the jury system. Perhaps all the other defects can be eradicated by a more reasonable law, but this vice is innate and inseparable from the jury — it destroys the uniformity of punitive justice — it is a great evil — it can be found in judges, among the severest and the most clement, but in the last analysis, they base their decision on juridical reasoning, and their decisions do not vary to any great extent. An intelligent and experienced attorney for the defense can always foretell the fate of his client with some degree of probability. But, with a jury, every prediction is rash and deceptive, for they base their decision on sentiment. And nothing is more capricious and changeful than sentiment. Fortune smiles upon the accused; and the names which come from the jury wheel are those of men, who find, in themselves and in the temptations to which they have been subjected, excuses for the fault of the accused, or others, who having seen how easy it is to lie, distrust the witnesses for the State. Should fortune be against the accused, then if he is accused of theft, the jury wheel turns out the names of the wealthy, who constantly complain of the deprivations of which they are victims; or, if he is accused of some attempt upon the chastity of a woman,

the jury system by Carmignani, exclaimed, "Your logic is perfect, but you are destroying liberty." Without inquiring whether liberty is possible without logic, the fact is undeniable that juries are too easily influenced by politics not to open the door to onesided views and declamations. This gives rise to enthusiasm in its favor, while the criminal sociologist takes a very different point of view. Just prior to the upheaval in France, philosophers and jurists favored the establishment of an independent judiciary, but the French Revolution, full of defiance against aristocracy and all social castes, and enthusiastic for the omnipotence and omniscience of the people, attacked this tendency and instituted the jury system. While it tried to reinstate classical antiquity in the political order, in the judicial, it championed the English institution, which the Athenians and Romans, and some medieval European peoples had known in an embryonic state. It looked upon it as a means by which the people in dispensing its own justice would have no tyranny to fear.[1] The jury system would ensure the sovereignty of the enfranchised people, representing the conscience of the country and substituting popular good sense and good heart for the pedantic doctrine of men grown old in study and prejudiced by caste. It was too much in accord with the reigning ideas not to be adopted. It is

then the jury is composed of men who love their daughters tenderly or are jealous of their wives; and so it goes. The chance of the wheel is much more important than talent or its lack in the lawyer. Furthermore, trickery is of more avail than knowledge. At Massa, I defended a man, who had murdered his wife's lover in full day in a crowded restaurant. I found out which of the jury were single and which married, challenging the former, and I won. That is the intrinsic vice of the jury system and legislation cannot cure it."

[1] *Tissot*, "Du droit pénal" (Paris, 1880), Vol. II, p. 461. There are three principal forms of juries: the Roman, the feudal, which means a judgment by one's peers, to insure impartiality by the social equality between the judges and the judged; and the English (badly imitated in Europe), which was the judgment of witnesses. They finally became not only the definitive judges (in the petit juries) but decided in the grand jury, the question of prosecution. Thus the English jury exercises complete judiciary sovereignty in prosecution and conviction for crimes and misdemeanors. Its verdict must be unanimous (and its deliberation more or less spontaneous), when the accused pleads not guilty, for there is no jury, if he confesses. The jury can recommend the defendant to the mercy of the court, or find that he is guilty of another crime than that of which he was accused. These guarantees, together with long historical usage, lessen, in the case of the English jury, the harm done by lack of scientific capacity, although it is not done away with. To this vice is added the quality of class legislation (the inverse of the feudal system), for women and laborers are excluded from English as from Continental juries. See *De la Grasserie*, "Origines, évolution et avenir du jury," R. I. S. (July, 1897); *Nunzio*, "Genesi dell' istituzione del giuri," in "Filangieri" (1898), p. 481.

a striking example of the organic connection between social and political conditions, and philosophical ideas and juridical systems. If the jury system, brought over to the Continent, was reduced, despite the so-called improvements mentioned by Bergasse in a report to the Constituent Assembly on 14th August, 1789,[1] to a very different institution from the English, both in the method and object of its work, it still enjoyed a sufficiently marked and seductive aspect to assure it a mass of admirers, notwithstanding its unsatisfactory results. Many were the remedies suggested.

§ 318. The Jury System: Its Advantages and Disadvantages.

As the jury is, however, a legal institution, we must examine its advantages and disadvantages, not only from a political point of view, but also, and more particularly, from a juridical point of view, in order to decide which are the greater. Its political advantages diminish singularly at the thought that, no matter how great a recognition of the sovereignty of the people the jury may be (and many doubts have been expressed on this score,[2]) its actual power is small because of the practical limitations imposed upon it. First, class defense in criminal justice is not abolished by the jury, for every successive reform, above all in Italy, has excluded the popular and heterodox classes from the jury list. As a result, in Italy and elsewhere, the jury represents not so much the sovereignty of the people as the legal sovereignty of the middle class. Furthermore, as Ellero points out, the essential distinction between a juryman and a judge is that the former is selected by choice and the latter by appointment or election. Consequently, every man who is a member of the citizen body and possesses civil and political rights, can, according to the spirit of this institution, cast his vote without restriction in all cases, civil and penal, petty and serious, not only in definitive but in interlocutory measures. And yet the recognition of the absurd results obtained by public assemblage has brought about restrictions of all kinds upon the principle from which the jury system emanated.

As a political institution, the jury is practical only when its fundamental principle is almost destroyed. On the subject of the jury system Erio Sala[3] made a true statement of our

[1] *Hélie*, "Traité de l'instruction criminelle" (Paris, 1858), Vol. III, § 593.
[2] *Pessina*, "Opuscoli di diritto penale," p. 296.
[3] *Sala*, "Sull' istituto della giuria" (Modena, 1875), p. 45.

position when he said that we always fell into the absurdity of placing the judge to guard the jury and the jury to guard the judge. Pessina[1] also pointed out our distrust of juries, as evidenced by judicial surveillance. We can add that on the Continent, the jury further fails to realize the sovereignty of people even more than in England, where it can recommend mercy, censure, and make accessory modifications.[2] And so, to Jouffroy and those who with him hold that the jury is the advance guard of our freedom, we can reply, that either the government is tyrannical and thus the juries know nothing of liberty, as was the case in England from the reign of Henry VIII to that of James II, and "the jury, when power was corrupt and the judge vile and intimidated, was no great help to liberty," or else the government is liberal and the judge independent, above all if given the requisite guarantees.[3] History shows that very despotic governments have accepted the jury system. There were juries in Northern Italy under Napoleon in 1815, in Bourbon Naples in 1820, and in Lombardy and Venetia under the Austrian régime in 1849. Russia refuses trial by jury to political, but permits it for ordinary, criminals. Italy to-day, due to a political reaction, has withdrawn a large number of ordinary[4] and politico-social offenses[5] from the jury. Thus the jury, as a liberal and political institution, is never found where it is needed, or else is found to be powerless and useless.

§ 319. The Jury as a Juridical Institution.

In England, however, the jury is looked upon as a juridical body. It is in this light that it should be examined. There are two great advantages attributed to it. The first is, its "moral judgment," which perhaps corresponds to the "aequitas" of the Romans. Law, it is said, has always a certain rigidity and helplessness, because it looks to the future and is founded on the past. When, therefore, facts and circumstances unforseen by the legislator arise, it is impossible for the judge to apply the same positive rules to them. An incessant and rapid progress takes place in human society, with which it is impossible for penal laws to keep

[1] *Pessina*, "Opuscoli di diritto penale," p. 297.

[2] See examples in Mittermaier.

[3] *Tolonsei*, "Diritto e procedura penale," 3d ed. (Padua, 1875), § 2056; and *Sala*, "Sull' istituto della giuria."

[4] By an illegal measure inserted in a decree for the coördination and application of the penal code.

[5] By the exceptional laws of 1894 and 1898.

step, even if the Bavarian example is followed and the code changed with every generation, or the French, where a series of special laws tends to ameliorate the Code Napoleon. However great the foresight and prescience of the legislator, the infinite diversity of human nature can never be encased in the finite number of articles, more or less casuistic, of a penal code. This is the trouble that the jury must remedy. The people, who judge by an uncontrolled vote, can cure the imperfection of the statutes by a verdict. As sovereign judge, it can temper the "summum jus" by free interpretation, even contrary to the written law.

The second juridical advantage of the jury lies in the fact that the jurors follow in their verdict "intimate conviction," "the still small voice of conscience," or "natural instinct" rather than the refined and artificial tests of the professional judge. The reality of this quality in the jury cannot be denied. But they are not such rare merits that it is not better to fear and renounce them. The separation of the political and judiciary powers of the State is axiomatic. It is only an application of the universal law of the division of labor. We can admit the need of the constant reform of penal laws, naturally more progressive and variable than civil law, but we must not look upon such reform as a judiciary problem. Although a certain trend of ideas favors the consideration of amendment of statutes as a legal duty, still we believe that the real guard of our liberties is and will always be the written law. It is sufficient to recall that Socrates and Phocian were condemned to death by the tribune of Heliasts, who "by using and abusing a sovereign judicature became a legislative hydra inventing crimes and punishments at will." [1] And as to the individualization of legislative precepts, we must admit a procedural system and an organization systematically inspired by the positive method, in which the judges really enjoy conditions of scientific capacity and independence necessary to judge the man and not the crime. But, such a power given to a popular judge, presenting none of these conditions, and to a system inspired by entirely different ideas, cannot fail to be a danger. We are convinced, therefore, that the quasi-sovereignty with which the jury pronounced its verdict is one of its great defects. We can add that its power to make law a dead letter does more to lessen the zeal of reformers than arbitrary and empirical judiciary expedients. And further, what can be said of a legislative system, which

[1] *Ellero*, "Opuscoli criminali," p. 257.

encourages transgressions of its laws? Every citizen, who, as a juryman or in his observation of a jury, sees that law can be all but disregarded, loses some feeling for the intangibility of social prescription. The knife cuts both ways, "It is better to find the remedy in the law rather than in the subversion of the law." [1]

We cannot persuade ourselves that "the intimate conviction" as shown by the jury is a merit and not a fault. It cannot be denied that the present system of legal evidence does not fulfill its duty. It must be admitted that the only source of certainty for the judge is the moral conviction brought about by the testimony of all kinds advanced and argued before him. Of course, if penal judgment consisted only in deciding whether a certain action is good or bad, we believe that the individual conscience, which can deal with exactly such moral judgments, is sufficient. But if it is not true that penal justice is satisfied with certainty or uncertainty, and truth or falsity of a mass of facts, we believe it is beyond the power of an intimate conviction to decide. A scrutinizing, intelligent investigation is needed. It seems to be illogical for a citizen to be deprived of his rights and society exposed to the repetition of criminal attacks through a defective juridical protection, without either one or the other being able to ask the judge the reason for his decision. For, our opposition to the jury and its instructive verdict is based not only on its blindness but on its irresponsibility. Carrara is right in believing that as long as a "Guilty" or "Not Guilty" is a satisfactory verdict of the law-makers, the substitution of a professional judge for the jury is bad, but we agree with Carmignani that the opinion of a reversible judge is better than the verdict, which he calls the judgment of a Cadi. Apart from the necessity in a penal judgment such as we see it of giving the judge every means to follow up the consequences of his sentence in the treatment of the convict, the responsibility of every public functionary is too axiomatic to need further discussion. If the jury, as a representative and a part of the people whose sovereignty is supreme, can be neither appealable nor responsible, it is none the less true that this consequence of its historical and juridical origin and growth must be destroyed as dangerous.

[1] *Bentham*, "Treatise on Civil and Criminal Legislation," Vol. III, P. IV, Chap. V.

§ 320. The Capital Fault of the Jury System.

The advantages to-day attributed to the jury are open to discussion, but it remains for the positivist school to mark its capital fault. It is impossible to see how twelve men, chosen by lot, can really represent the popular conscience, which, in fact, often protests against and revolts from their decisions. But, be that as it may, although the laws have violated its essential quality by numerous restrictions, it still remains a principle that its quality as a part of the people gives it a right to give judgment, and, as the entire people cannot in modern States unite in assembly, the jury system is founded on the idea that the right to exercise this civil prerogative must be determined by lot. This double basis of the jury is in absolute contradiction with the universal rule of public and private life, that duties be awarded to capacity by deliberation and choice. This rule is but another aspect of the inevitable law of the division of labor. It may sometimes be violated in practice; but no institution can be formed without regard to it. To leave the gravest social necessities to chance is to deride human reason. It is remarkable, that while in the petty details of daily life recourse is had to different specialists for different functions, in a function so serious as that of penal judgment, there is no fear of disregarding this rule. The jury system not only elevates incapacity to the height of a principle, but celebrates incoherence, for no method can be prescribed for a beginner, no plan outlined for the exercise of a temporary function by a man whose aptitude has had nothing to do with his choice. Thus, chance presides not only over the election of the jury, but over its characteristic functions. Those who established the jury system did not fail to see its faults and they took divers expedients to lessen these harmful consequences.

§ 321. The Insufficiency of the Jury: Personal Capacity.

As to personal capacity, a number of restrictions, some founded on the necessities of human nature, others dictated by the need of avoiding as much as possible certain striking absurdities and which are consequently often arbitrary, and, finally, those dictated by the desire to exclude certain social classes (laborers and women) from the administration of penal justice, have been established. Hence, the system of categories or the sheriffs' lists, modified by different laws, are all practical absurdities,

for these indirect means give, at most (when they give it at all) only a guarantee of general and presumptive capacity, and not of a proven, or practically proven, or special aptitude for the functions to be fulfilled. They are petty expedients and not a radical solution of the problem. Even the last Italian law of 1871, which (as elsewhere in Europe), with its categories, closely resembles the system of Pisanelli, demanding as it does assurances of capacity, has not effectively remedied the trouble since it has made the census a basis of the jury's duty and therein lies the elemental vice of the jury system, because it has made the element least provided with necessary knowledge the predominant power for pronouncing judgments. But the proportions of the divers elements more or less educated which go to form the jury need not occupy us long, for two reasons furnished by present day sociology.

The assemblage of a certain number of persons generally intelligent is not a guarantee of the definite resulting capacity of the assembly, because in the psychological field the union of individuals never gives, as it would seem it should, a total equal to the individual value of each of them. An intelligent group need not be a result of the grouping of intelligent individuals, as in chemistry a liquid may be the resultant of two gases.[1] The ignorant elements which remain hidden in isolated individuals, unite, and through an effect of affinity and psychological fermentation, rise to the surface. The ancients felt this fact, and expressed it in a maxim; "senatores boni viri, senatus autem mala bestia"; the people feel it when they say that the

[1] *Garofalo*, in "Un giurì dipersone colte," A. P. II, 3, p, 374, reports an experiment made on a group of distinguished doctors, among whom were several famous teachers, who, when asked to give a verdict on a man accused of burglary, acquitted him in spite of clear proofs of culpability, and then acknowledged that they had been deceived — and they were men of great culture and the fact simple and well-proven. So what can be said of ignorant juries, who are faced with complicated questions which raise difficult matters of legal medicine? See analogous observalions by *Dorado*, in "Impressioni e riflessioni di un giurato," in the "Scuola positiva" (15 March, 1893); *Grother*, "The Psychology of a Jury in a Long Trial," in the "Medical Legal Journal" (March, 1895), p. 464; *Ajam* "Monographie d'un jury d'assizes," in "Archives d'anthropologie criminelle" (15 July, 1899). The addresses of district attorneys also could furnish much information about the workings of the jury system, but they are generally content with more or less sincerely defending the "status quo," as the judges in Beccaria's day defended torture as a necessary instrument of penal justice. See *Rigi*, "Il guirì nei discorsi dei procuratori generali," in the S. P. (July, 1895). For a Spanish work, see the investigation made by the Department of Justice and outlined in the "Revista general de legislacion y jurisprudencia" (August, 1899).

members of a certain social group, taken one by one, are fine fellows, but that collectively they are rascals. This fact is found with much greater certainty in juries, assemblies, and congresses, fortuitous and inorganic collections, than in a community of judges or experts, because in one case the heterogeneity of psychological elements (such as ideas, interests, tendencies, and habits), is more marked than in the other.[1]

But this is not all; juries, even when constituted by persons whose intellectual capacity is presumable, will never be able to exercise judicial functions in a satisfactory manner, because it must be governed according to an inferior form of intellectual evolution. If we consider the human mind in its progressive development, whether individual or social, we find three different states called intuition, perception, and reason, whose processes are very different, not in their essence, but in the manner of their sociological function; and they, too, are subject to the general law of evolution, passing continually from the simple to the complex. Now without being able to take up much space here with the considerations of psychology, it is evident that the jury can only be led by intuition or, very rarely, by perception — that is to say, by the unconscious habit of thinking in a definite manner, or by a natural perspicacity above vulgar prejudices. But reason, the highest form, is impossible for it. It cannot be reconciled with the accidental and inorganic union of general and varied aptitudes; it can be found only, on the other hand, in a homogeneous corps of judges. Pessina was right in saying that groups, however eminent their components, with the single exception of groups of jurists, always represent the manner of judging in the ordinary way, and not that power of criticism that the mind requires when it is constantly exercised in the examination of legal proofs.

§ 322. The Insufficiency of the Jury: The Incoherency of Its Acts.

As to the incoherency of the jury's acts, it has been thought possible to remedy this defect, partially at least, by distinguishing law and fact, to repeat the maxim of Montesquieu, that but one object, a fact, could be submitted to the judgment of the people,

[1] Of this fundamental fact, which we have called "collective psychology," *Sighele* made a convincing application treating another subject in "La foule criminelle." See also *ante*, and *Worms*, "Psychologie collective et psychologie individuelle," R. I. S. (April, 1899).

but without even remarking, as did Hye Glunek,[1] that the verdict represents a division and reduplication of the judicial problem which should, on the other hand, remain indivisible like the syllogism in which it is summed up. It is now recognized that the Arch-Chancellor Cambacérès was right in saying, during a discussion of the Council of State, that the distinction between fact and law is imaginary. Not only in the positivist system of penal procedure, where a knowledge of criminal statistics and anthropology, besides legal knowledge, is necessary, but also in the existing systems, the jury deals with the crime. That is to say, to quote Binding,[2] with a juridical fact and not simply a material fact. The judge deals with the punishment, but law and fact, in a penal process, are as inseparable as the face and reverse of a coin — as form and substance — even when care is taken, as in the different legislative changes effected in Italy, to avoid as far as possible juridical terms. Even admitting the possibility of such a distinction, logic and experience unite to deny the assertion made by a follower of Beccaria, "In the appreciation of facts ordinary intelligence is preferable to science, common sense to the highest intellectual faculties, the popular to scientific knowledge." [3] Pessina is entirely right in remarking that the work of a judge concerning the fact which gives rise to a penal judgment does not consist simply in an immediate perception of facts for which simple good sense might suffice, but is a difficult work of critical reconstruction.[4] The natural and organic differences between penal and civil law must be insisted upon. While generally, in civil litigation, the fact has an accessory character, and the whole question depends upon the application of the law to the facts which can be admitted by both parties, in trials of a penal order, the greatest difficulty lies in the discovery or appreciation of the facts. To this appreciation, depending on the evidence, the inferior form of common sense and perception does not suffice; it needs the aid of the critical sense of study and science. It can well be, as Ellero said, that "in the penal process the question of fact is much more difficult than

[1] *Hye Glunek*, "Schwurgericht," 1864.

[2] *Binding*, "Die drei Grundlagen der Organisation im Strafgericht" (Leipsig, 1876).

[3] *Hélie*, "Traité de l'instruction criminelle," § 593, p. 228; *Brusa*, "Sul giurì," in the "Rivista penale" (March, 1882); *Carrara*, "Reminiscenze" (Lucca, 1883), p. 361.

[4] *Pessina*, "Opuscoli criminali" (Naples, 1894), p. 300.

that of law." [1] Daily experience has given so many striking proofs of the incapacity of the jury for criminal criticism merely as far as facts are concerned, that it is useless to insist further.

§ 323. The Jury Considered Psychologically and Sociologically.

More conclusive still are the disadvantages of the jury system resulting not from exceptional circumstances (incidental to the best of institutions) but from the laws of psychology, and which, therefore, cannot be avoided by expedients of procedure. Science does not deal with facts, but laws. As far as intuition or perception is concerned, on the contrary, the active impression of a present fact is the sole preoccupation, without any study of hidden ties, which bind it to a general law. Hence, the inevitable tendency of the jury to allow itself to be influenced by isolated events, guided, as it is, by a sentiment of compassion if much time has elapsed since the crime, or governed by a more or less disguised feeling of vengeance, if class interest or a short interval has not allowed the first impression of the misdeed to cool. Hence, shortsighted judgments, governed by passion, which cannot be approved by the people. This predominance of sentiment over reason, which is the fundamental note of the jury, is first of all shown by the nature of the arguments of counsel. There is no need for profound philosophical or juridical thought; there is nothing to which it could be applied. As to criticism of evidence or logic, they need not be considered. What is of capital importance is oratorical charm. Thus, science, not only criminal, but medical and anthropological, is not found in the criminal courts of to-day, for it is necessary to place the most difficult scientific problems within the sphere of popular knowledge, with the certainty that chance and external circumstances alone will decide the question. This unfortunate position of science is inseparable from the existence of the jury system, as is shown by the difficulties arising from the universal desire to regulate the position of experts in criminal trials. But the criminal courts are not only unpropitious for science, but also so abuse certain of its results that it is almost forced to disown them, because the jury system has destroyed their natural qualities. Hence the discredit attached to scientific progress and the diffidence with which it is received, even though it can illume the blindness of penal justice. Another disadvantage of the jury system is that the verdict cannot faith-

[1] *Ellero*, "Opuscoli criminali," p. 371.

fully represent the sum of individual convictions. The jury which in the Italian system is exposed during the recesses of the court to outside influences, is, moreover, even in England, subjected to influences in the court room, whether the law demands a unanimous verdict, or whether it is satisfied with a majority. The result has been a proposal to make the deliberations of the jury public.[1]

§ 324. Disadvantages of the Jury System: The Tendency of the Professional Judge to Convict.

We have now come to a point where it seems, without having recourse to a mass of facts and figures, which, however, form an eloquent confirmation of our opinion, that the disadvantages of the jury system, and above all its juridical disadvantages, should weigh more than its advantages in the logical scale.

As a corroboration of what we have said, however, we will give two final observations. The first consists in the most serious objection made to professional judges. The other is based on the law of sociology. It is argued that a professional judge, accustomed as he is to judge criminal actions, is irresistibly led to look upon every accused as guilty, and to disregard, so to speak, the presumption of innocence, even when justice insists upon it most emphatically.[2] Psychological study shows that, as a result of the universal law of the course of least resistance, there is a conversion of the conscious into the unconscious, which results, as it were, in a definite polarization of individual faculties and acts, which Ferrero called the ideo-emotional arrest.[3] This objection, founded on the organic and psychic nature of man, has, it is true, a certain value; but not enough, it seems, to be able to counterbalance the faults of the jury system; and that for many reasons. First of all, putting aside the exceptions caused by the defects of the actual organization and the intellectual insufficiency of the judiciary, it must be admitted that when an accused is finally brought to trial the rigorous course of examinations in the preparation for it appreciably reduces the

[1] *Carrara*, "Opuscoli di diritto criminale," Vol. IV, op. III.

[2] See *Sorel*, "La psychologie du juge," in the "Archivio di psichiatria" (1894), XV, 29; *De Lano*, "L'âme du juge" (Paris, 1899), and an essay, "L'anima dei magistrati" (professional deformations) by the positivist *Ciraolo*, in the "Revue politique et littéraire" (June, 1899).

[3] *Ferrero*, "I simboli" (Turin, 1893), last chapter; or better, in the French translation, "Les lois psychologiques du symbolisme" (Paris, 1895), p. 294.

probability of his innocence, and, in the second place, this tendency of judges is partially paralyzed by the publicity of the trial, and will be more paralyzed still (as Ciraolo says) by a publicity in the preparation of the trial such as exists in Geneva, and such as has been recently enacted in France. The proof of this is that the most marked facts cited in favor of this objection relate to past times, or to the preparation of present trials.

This point presents an interesting historical problem — the coexistence of a complete inquisitorial system which considerably diminishes individual protection, with the political liberty of the Italian Republics of the Middle Ages. In the third place, Courts of Correction which should not follow this custom give a percentage of acquittals and allowances of extenuating circumstances about similar to that given by courts in which there are juries. If, on the other hand, the disadvantage of the tendency of the judiciary to condemn is to be feared, the jury for its part does not avoid the no less dangerous influences of popular prejudice. In a word, it is a question of deciding whether the predominance of social criteria under the jury system is preferable to that of personal and class criteria under the judiciary, provided that under the latter system there will be assurances of the essential conditions of scientific capacity and independence. For it is certainly not the guarantee in favor of the individual which is lacking in our day. Reductions and remissions of sentence, appeals, certioraris, and revisions, which singularly lessen (and even destroy in a rational system of procedure where all sentences will be periodically revised) the value of this objection. Every one who subscribes to this objection must logically favor the adoption of the jury system in Courts of Correction, for why should a number of accused, infinitely larger than that of the criminal courts, be deprived of the alleged guarantee of a popular verdict?

§ 325. Disadvantages of the Jury System: Psychologically Unfitted for Europe.

If, however, the value of this objection to the judiciary is increased by reason of the faults which the bad choice of the personnel entails upon the administration of justice, we shall find a much greater objection shown by sociology against the jury system, transplanted full grown into Italy and into France by the artificial power of legislative enactment. The natural sciences have shown by the laws of natural evolution that no suitable and

profitable variation is possible in a vegetable or animal body without a slow, continuous, and opportune preparation, effected by latent organic forces and exterior circumstances, because duration does not respect what is made without its intervention. They have shown that inexorable natural laws atrophy every organ which survives deprived of its proper function, and that consequently no new organ can exist if its existence is not demanded by the innovation of a corresponding function. On the basis of these scientific laws, sociology, which considers human society as a natural organism, establishes the fact that no social institution is truly useful and durable unless it is natural, that is to say, the necessary effect of a number of organic and psychic causes existing for a considerable period in the most profound sources of the life of the people. It further establishes the fact that social evolution is a continual passage from the homogeneous to the heterogeneous, and that consequently its organs and institutions do not subdivide or multiply except through the activity and multiplication of social functions.

If this principle be applied to the jury system, it is observable, first of all, that it did not make its appearance on the Continent of Europe through the temporal development of the ethnic and historic elements of the different peoples (for in the places where there should be some trace of it there is none at all), but it was transplanted by legislative act. England alone, which has the good fortune to possess an anti-symmetric but spontaneous and ancient social and political edifice, can maintain the jury system as a natural product of its people,[1] consequently, it is more vital there than elsewhere. In England, law was begun and has grown with the people, and criminal procedure, above all, has always been based on the strictest relations with the customs and the social and political state of the nation. But if European countries, which with civilizations differing among themselves, have imitated more or less closely the English jury, detaching it, however, as Mittermaier said, "from the natural basis of the institutions and principles which are its necessary correlatives in England,"[2] we do not hesitate to say that this institution is one of those which Spencer would call false membranes in the collective body, with-

[1] And yet, even in England the jury has numerous and powerful adversaries (from Bentham to Brown) as noted by *Van den Heuvel*, "Apologia del giurì in Inghilterra," in the "Rivista penale" (June, 1887). See also, "Il giurì in Inghilterra" (Citta di Castillo, 1887).

[2] *Mittermaier*, "Traité de la procédure criminelle en Angleterre," etc. (Paris 68.)

out physical ties to the rest of the social whole. There is no terrible consequence to be feared when another legislative act deprives society of this institution which is not indigenous and whose essential vices have been shown; vices which, preventing its acclimation, have only been recognized, in France for example, after a century of constant experiments.[1]

§ 326. Disadvantages of the Jury System: Not Evolutionary.

In regard to the sociological law of unity of organs corresponding to the unity of functions, it seems that in England, where the jury and the judiciary have grown side by side and interlaced, it is an historical phenomenon which is in nowise contrary to this law, for these two institutions present in their diversity, through the admirable coöperation of jury and judges in the sentence, that organic unity which results from a process of integration, which Spencer says is the fundamental note of evolution. In Continental countries, however, where the jury has been attached by simple superposition to the judiciary, a well developed organ of social function, it seems, in fact, a phenomenon of superfetation. If it is argued that the jury, constituting a step from the homogeneous to the heterogeneous, marks in that a further step in

[1] The present provisions for trial by jury in criminal matters are as follows: England, Scotland, Ireland, and Switzerland used juries for criminal and correctional matters. France, Italy, Austria, Istria, Croatia, Dalmatia, Rhenish Prussia, Alsace-Lorraine, Bavaria, Bohemia, Gallicia, Belgium, Roumania, Greece, Portugal, Russia, and Malta have trials by jury in criminal matters. Spain had suspended it, but reëstablished it in 1888. For details, see *Torres Campos*, "Il giurì in Ispagna," in the "Rivista penale" (April, 1894). Russia does not allow trial by jury for political offenses or for rape, resisting arrest, murder, and bigamy, which are tried by the Court with the assembly of class-representatives. Prussia, Saxony, Baden, and Wurtemberg have trial by jury in criminal cases, with trial by sheriffs in correctional and police matters. Denmark, Sweden, Finland, and the Canton of Tessin have trial by sheriffs. Sweden has trial by jury for crimes of the press. Holland, Norway, Slavonia, Transylvania, Poland, Servia, Croatia, and Turkey have neither trial by jury nor by sheriff. Hungary, which formerly employed the jury system for political crimes and those of the press, has had it for ordinary crimes under the new Code of Penal Procedure since 1st January, 1900. See "Questionnaire pour la comparaison des statistiques criminelles [(*a*) Méthode pour la préparation de statistique criminelle; (*b*) Procédure pénale; (*c*) Législation pénale]," in the "Bulletin Instit. intern. statist." (Rome, 1892), VI, fasc. 2, p. 161. And for the conditions governing the choice of juries in different countries, see *Nagles*, "Le recrutement du jury en Belgique et dans les autres états," J. T. (4th, 5th June, 1899). There is discussion to-day of introducing the jury system in the Republics of Argentine and Cuba. See *Aguirre*, "El jurado, su implantación en la República Argentina," in the "Criminologia moderna" (1898), I, and (1899), VI; *Domingues*, "Del juicio por jurados," *id.* (1899), V; "Revista del foro" (Havana, 1903). 7, 8.

social evolution, a distinction should be made, for there is evolution when the passage from the homogeneous to the heterogeneous forms at the same time an integration by assuring the organic unity of the elements; but when in departing from the normal laws of organic nature it creates disintegration by lessening its unity, it must end, not in evolution, but in dissolution.

Division of labor, which has produced multiform organs and functions in the zoölogical scale, as well as in the field of political economy, science, and public and private administration, constitutes a source of change, which we call by the name of progress; but the passage from unity of form to multiplicity, which occurs in the maladies of animals with numerous organic changes, as well as in social revolutions with a series of extra-legal institutions, forms, on the contrary, the beginning of the end. Thus, the passage from the homogeneous to the heterogeneous effected by the jury system on the Continent of Europe belongs in my opinion to social pathology, and threatens to destroy a part of the judicial organism, if the hand of the surgeon does not interfere in time. Many legislators and judges have not yet seen this, and while some have treated the sick institution, others have put it on a diet by continually correcting the crimes in a more or less legal fashion and sending them to tribunals of correction. But this is not all; the law of specialization of functions, of which so many examples are easily found in biology and sociology, makes every organ, to the degree that it is adapted for a special work, to the same degree unsuited to every other task. Zoölogy teaches that the organs which fulfill special functions in the vertebrates, such as deglutition, digestion, secretion of humors, or oxygenation, are confused in the protozoics, both in themselves and in the work which they perform. Thus sociology teaches that if a man could be found among the ancients who knew at the same time physics, theology, metaphysics, and politics, and among savages there are men who are at the same time warriors, hunters, fishers, and architects, among civilized people, on the contrary, the physiologist cannot be an astronomer, and the chemist cannot be a lawyer, for each workman fulfills his special duty. The jury system is a direct contradiction of this law, since it imposes on one individual functions very different and distinct from those which he habitually pursues.

It is useless to object that the franchise violates this law of specialization of functions, for we must distinguish be-

tween rights and functions, one founded on necessity and the other on capacity. The franchise is an elementary right. Judicature is a technical function. They are very different, not only by their nature, but in their object. The voter only designates some one whom he thinks endowed with certain general qualities. The juryman must pronounce a verdict, which should be the result of a very complicated critical examination. The action of the voter has only an indirect result; and furthermore, the voter merely entrusts some one whom he thinks better suited than himself with the fulfillment of the duty. The action of a juryman, on the contrary, has a direct and important result, and presupposes a special and recognized capacity. It is not true, therefore, notwithstanding what Carrara says, that there is any inconsequence "in refusing a people full participation in the exercise of judicial authority when the institutions of the Nation give it a part in the exercise of legislative authority." The functions are too different. Such an argument would only be logical in upholding the popular election of judges, which we desire in the actual period of transition to replace subsequently by the choice of a technical personnel. The franchise, the right of every social element enjoying juridical life, is comparable to the phenomenon of general assimilation effected by every histological element enjoying organic life in the animal or vegetable body, for the franchise is nothing but the general observation of the elements necessary to the life of the collective organism which is soon attacked by cachexia when political apathy does not allow it to form blood and be nourished. It is not a technical function in the strict sense of the word, which can be compared to the administration of justice.

327. The Necessity of the Abolition of the Jury System in the Trial of Ordinary Crimes.

History and sociology show, therefore, that the jury system is a retrograde step. It is, as Ellero said, a return to the barbarous times of the Middle Ages and represents in penal justice a phase different and distant from maturity and perfection. And, yet, positivists must (for there is no ill-wind but brings good to some one) show with more evidence the illogical and dangerous consequences to which popular good sense has naïvely brought some of the theories of classical penal law. Examples of this are given by the finding of extenuating circumstances as a protestation

against the death penalty, or, what is worse, against the excessive zeal of the prosecutor, duress allowed as a defense to even petty thefts, homicides, or in aid of a third party. It has shown, on the other hand, the points on which common sense itself has shown the necessity of reform in other penal theories in accordance with the actual demands of the positive school, for example, by acquittals under unwritten law or for political crimes or violation of censorship, and also in more rigorous verdicts against habitual delinquents.[1] Logic, therefore, leads to an irresistible conclusion that the jury system does not meet the requirement of all judicial institutions. To bring our scientific inductions to the realm of practice, the jury system must be abolished in the trial of ordinary crimes, although first, the reforms of the judiciary to insure its capacity and independence must be effected.

As it is easier, however, to institute than abolish social institutions, there is but small chance that the hopes of science will be realized, in spite of all the opposition which experience has aroused against the jury system on all sides and from divers causes. In conclusion, therefore, we will outline some proposed reforms, which, among the many advanced independent of those already cited, seem to bear more directly on the organic faults of the jury. These, while not fully corrective (which seems impossible of attainment), will do much in avoiding its gravest and most constant faults. Although the distinction between common and political crimes and those of the press seems neither scientific nor real, provided that the so-called political crimes are not misdeeds (such as the expression of ideas, etc.) or committed under the influence of a noble passion by pseudo-criminals (evolutive criminality in atavic forms), it is, nevertheless, useful to preserve the jury in political crimes and those of the press and social interest, notwithstanding that in the last case the verdict may be influenced by class interest, which cannot be combated except by giving laborers a large place on the jury, from which they are excluded to-day.

As long as the judiciary is not entirely protected from the more or less direct pressure of the executive power (impossible without radical reforms and a certain predominance of the political importance of the jury), it is the part of wisdom to entrust to it the judgment of some infractions which too often furnish the executive

[1] See as a development of this observation made in the 3d ed. (1892), p. 673, *Sorel*, "Il giurì e la crise del diritto penale" S. P. (December, 1898).

with an occasion to enter upon a course of repression, which, if we would but believe the constant, eloquent, and always disdained lessons of history, produce effects very different from those intended. As to the trials of common crimes; confessions, when corroborated by external evidence (to avoid those made by motives of self-interest or through mental disease) should remove the case from the jury. The prosecution is based upon the idea that a criminal trial is a private affair, and it is unjustified when one of the parties does not desire to proceed, hence, the English distrust a confession, which they look upon as a refusal to contest. To avoid certain disadvantages, however, pointed out by Carrara,[1] the Scotch system seems preferable to the English. In England, the judge first asks the accused whether he pleads "Guilty" or "Not Guilty," and upon the former plea condemns him without a verdict. In Scotland, on the contrary, the district-attorney must present the evidence and ask for a verdict. In this way, the scandal of a mass of abusive and absurd verdicts, entailed by the Italian system, are avoided, on one hand, while, on the other, the danger of an untrue confession and a condemnation of a man juridically irresponsible are likewise avoided.[2] Such remedies are but palliations. The only positive conclusion is: let us preserve the jury on condition that all social classes be equitably represented on it for crimes of a politico-social order, but let it be abolished for common crimes, when the radical reforms which we have mentioned for the insurance of the independence and capacity of the judiciary, have been effected.

[1] *Carrara*, "Opuscoli criminali," Vol. I, op. 4.

[2] For the desires of accused persons in conformity with the positive school, see, *Ferri*, "Polemica" (Bologna, 1886), p. 162; *Garofalo*, "Sulla confessione dei rei," A. P. (1886), VII, 448; and *Albano*, "Carcere preventiva e libertà provisoria," S. P. (30 September, 1891). We will not take up here the question of "technical juries," which can be employed in only a very restricted sphere for crimes of a special technical character, nor the system proposed by Stengel and Hilgard in Germany, and by Pessina in Italy, which consists in making the judge and jury give a verdict. It seems scientifically correct but very hard to work practically. It should be only a makeshift until the jury system is established. For "échevinage" see *Cruppi*, "La cour d'assises" (Paris, 1898), Chap. XI; and "Jury et échevinage," in the "Revue pénitentiaire" (December, 1899); *Leloir*, "Le jury correctionel dans la Suisse romande," B. U. I. D. P. (1888), XIX, p. 547; *Gneist*, "Giuria a scabinato," in "Filiangieri" (1897), fasc. 3, p. 191; *Caldara*, "Lo scabinato nel Canton Ticino," S. P. (October, 1899).

CHAPTER V

THE "BANKRUPTCY OF THE CLASSICAL PENAL SYSTEMS" AND THE POSITIVIST SYSTEM OF REPRESSIVE SOCIAL DEFENSE

Fundamental criteria of the defensive system. Segregation for an indeterminate time with periodic revision of sentences. Reparation of the damages as a function of the State. Appropriation of specific measures to the categories of criminals reversing the classical unity of punishment. Common characteristics of the different establishments of segregations.

§ 328. The Bankruptcy of the Classical Penal Systems.

That the existing penal systems — inspired on one hand by the pretension of measuring the moral responsibility of delinquents, and on the other by the hope that they are in general corrigible, this being consequently reduced more and more to an almost exclusive predominance of detention under the cellular system — have completely failed in their office of protecting society from crime no longer requires proof.[1] One of the most famous classicists, Holtzendorff, frankly wrote that "the penal systems are bankrupt." "The powerlessness of repressive action in Italy,"[2] has also been recognized. The conclusion has been reached in Germany[3] that existing "penal law is impotent against criminality," and there is talk of "the check of existing systems of reprisal and intimidation."[4] In France, "the failure of repression" has been described.[5] As to England, where,

[1] A compendium of the present systems of penalty, complete in data and citations, has been prepared by *Altgelt*, "Our Penal Machinery and its Victims" (Chicago, 1886), and by *Sarrzewski*, "Die heutige Strafrechtspflege mit ihrer Gefahr für die Allgemeinheit" (Krefelt, 1890). And among those who write from personal experience, *Kropotkin*, "In Russian and French Prisons" (London, 1887); *E. Gautier*, "Le monde des prisons," III, 417 *et seq.*; *Romussi*, "Osservazioni sui reclusori" (Milan, 1899); *Valera*, "Dal cellulare a Finalborgo" (Milan, 1899); and among the most recent penitentiarists, *Tallack*, "Penological and Preventative Principles" (London, 1889), Chap. II.

[2] *Aguglia*, "L'impotenza dell' azione repressiva in Italia e sue cause" (Frascati, 1884).

[3] *Liszt*, "Kriminalpolitische Aufgabe," Z. G. S., IX, 482.

[4] *Seuffert*, "Rapport à l'union internationale du droit penal," cited by *Rivière*, "Du rôle de l'individualisation dans l'exécution des peines," in the "Revue pénitentiaire" (1894), p. 1044.

[5] *Joly*, "Le Krach de la répression," in the "Correspondant" (25 February,

however, the betterment of social conditions and measures of indirect prevention have led to a diminution of natural and atavic criminality, Griffiths, Inspector-General of Prisons, concluded an address: "In our opinion, all the systems of imprisonment, although studied with care and conceived with ingenuity in a humanitarian spirit, have no influence of an appreciable kind on criminality. England has tried all. She has hung by hundreds, deported by thousands. She has employed cellular prisons, prisons with separate quarters, prisons in common, and all the kinds of repression, which have been invented. Well, at the end of the nineteenth century, can we indicate in favor of such or such a system results which are truly typical and evidentiary from the point of view of the diminution of criminality?" [1]

In the United States Chief Justice White concluded his study on the "Increase of Crime" in the following words: "All this shows the deplorable fallacy of our penitentiary system as well for intimidation as correction," [2] and the same can be said more or less of every country. So the necessity of remedying the evil has constantly grown in the minds of men. Some would effect it by legislative propositions, by partial reform, more or less efficacious, but all by a reaction against penitentiary classicism, whether they follow a scientific propaganda or not. The faults of organization, in the principles of the classical criminal theory, and in the practical applications of the classical penitentiary theory, may be resumed as follows: imaginary measurement of moral and penal responsibility in definite doses — absolute ignorance and disregard of the physio-psychological character of the criminal — lack of connection and forgetfulness of the relation between the law and the sentence on one hand, and the sentence and its execution on the other — disastrous effects, such as corruption and criminal associations with their centers in the prisons themselves (such as the Camorra and Maffia), millions of people condemned largely to short, stupid, and ridiculous terms of imprisonment — and lastly, a continual increase of recidivity.

1896). Joly himself, in "Les associations de l'état dans la lutte contre le crime," in "Revue politique et parlementaire" (September, 1895), invoked the aid of private associations to repress crime, without perceiving that the causes of the evil were elsewhere.

[1] *Griffiths*, "La lutte contre le crime," in the "Revue pénitentiaire" (1893), p. 623. See also, *White Mario*, "La crisi carceria in Inghilterra," in the "Scuola positiva" (May, 1897).

[2] In the "Transactions of the New York Medical Association," and "Revue pénitentiaire" (1896), p. 815.

Thus, "the Courts of Europe," writes Prius,[1] "with their entirely impersonal modern justice, drop condemnations on the unfortunate as a sprinkler scatters water on the earth." It is impossible to question the necessity of substituting a system of social defense better adapted to the conditions determinative of crime, and consequently more efficacious in the protection of civil society, and at the same time less disastrous for the individuals who come in contact with it, in place of the present penal organization. The positive school over and above the efficacious, although partial remedies proposed by Lombroso,[2] and the important practical propositions, made by me in the second Italian edition of this work, has presented in Garofalo's "Criminalogia"[3] a rational system of penalties which it is well to make a synopsis of here.

I. Homicides (moral insensibility and distinctive cruelty).	Homicide committed for money or some other egoistic pleasure.	Imprisonment in asylum for criminal insane or death penalty.

II. Violent Men or Those Controlled by Impulse (lack of feeling of pity, prejudice as to honor, duty, or vengeance).

Adults	Homicide provoked by sudden severe conflict. Homicide in self-defense.	Local exile. Removal from locality of victim.
Adults	Homicide for honor or vengeance (isolated or endemic).	Relegation to an island colony, distant village, in liberty but under surveillance (for a definite time with a period of observation of from 5 to 10 years).
Adults	Assault, rape, robbery, abduction.	Reparation in damages and fine. Rigorous for solvent agents, replaceable by confiscation of part of salary or compulsory labor—with imprisonment in case of refusal.

[1] *Prius*, "La loi sur la libération conditionelle et les condamnations conditionelles," in the "Revue de Belgique" (15 August, 1888). For the action of the courts of inferior jurisdiction see *Cornell*, in "Scribner's Magazine" (February, 1897), and "Review of Reviews" (1 April, 1897) p. 81. See also, *Robert Smith*, "The Social Aspect of New York Police Courts," in the "American Journal of Sociology" (September, 1899).

[2] *Lombroso*, "L'incremento del delitto e i mazzi per arrestarlo," and "L'uomo delinquente" Vol. III, 5th edition.

[3] II ed. 1891, pp. 457 *et seq.*

Minors	Assaults. Sexual crime.	Asylum for the criminal insane (for culprits with a congenital tendency). Penal colony, and in cases of recidivity, deportation.
III. Delinquents Lacking Sense of Honesty.		
Adults, habitual	Robbery, swindling, incendiarism, forgery, extortion.	Asylum for the criminal insane (if the culprits are insane or epileptic). Deportation.
Adults occasional	Robbery, swindling, incendiarism, forgery, extortion.	Labor, for an indeterminate period — until aptitude for regular work is acquired, or injunction against the pursuit of profession until complete reparation in damages.
Adults	Peculation, extortion, graft, abuse of office.	Loss of office. Injunction of public officer. Fine. Reparation in damages.
Adults	Incendiarism, devastation, damages caused by vengeance (without attempts against the person).	Reparation in damages; in default, prison. Asylum for criminal insane (for the insane). Deportation (for recidivists).
Adults	Bankruptcy. Criminal insolvency.	Reparation in damages. Exclusion from business and public office.
Adults	Counterfeiting, forgery of negotiable paper, perjury, usurpation of titles, false evidence in aid of culpable.	Imprisonment for an indeterminate period, and fine (in addition, deprivation of office and reparation in damages).
Adults	Bigamy, substitution of children, kidnapping.	Relegation for an indeterminate period.
Minors	Robbery, swindling.	Farming colony (for an indeterminate period).
Adults and Minors	Rebellion, revolts, resistance to authority.	Imprisonment for an indeterminate period.

Liszt,[1] agreeing with the positive school in upholding the necessity of radical reform in the methods of repression, proposed

[1] *Liszt*, "Kriminalpolitische Aufgabe," Z. G. S. (1890), X, 51 *et seq.* and for a less radical system of penal reform see *Prius*, "Science pénale et droit positif" (Brussels, 1899), Bk. VIII. See also, *Penta*, "Il trattamento del delinquente"

an intermediate system. While failing to take account of the different categories of delinquents, and making but one distinction, that of habitual and occasional delinquents, he gave a system which must be complimented, especially in view of that proposed by Garofalo, which in itself has some faults.

§ 329. Fundamental Criteria of the System of Social Defense.

Before speaking of the more or less complete particular propositions, it is necessary to establish certain general criteria, which, based on scientific knowledge of the individual, physical, and social features of criminality, can serve as the basis of the positive system of social defense against crime. They can be reduced to three: *a*. Segregation for an indeterminate period. *b*. Reparation in damages. *c*. The choice of defensive means for different classes of delinquents.

§ 330. A. Segregation for an Indeterminate Period.

The penal problem must not consist in fixing a certain quantum of penality, hypothetically proportioned to the fault of the delinquent for every crime committed. It must be a decision whether, given the objective conditions of the act (right violated and harm done) and the subjective condition of the agent (determinative motive and anthropological category), it is necessary to separate him from his social environment permanently or for a longer or shorter time, depending upon whether he is readaptable to social environment, or whether a rigorous reparation of the damage caused is sufficient. At the Anthropological Criminal Congress at Geneva, Griffiths, the Inspector-General of Prisons in England, adopting the ideas of the positive school, stated the penal problem in these words, "It is necessary to divide delinquents into two main categories; those who should never go into a prison, and those who should never come out." Imprisonment is useless for occasional delinquents. A fine or conditional

(Naples, 1896), and the criticism by *Lombroso* in the "Archivio psicologico." More recently *Liszt*, through his theory of determinant motives, divided punishment into three kinds; those of intimidation (reprehension, fine, imprisonment) for occasional delinquents; those of amelioration (forced labor) for corrigibles, and those of protection (execution, isolation) for incorrigibles. "Die psychologischen Grundlagen der Kriminalpolitik," Z. G. S. (1896), XVIII, 314; and *Sichart*, "Strafgesetz auf soziologischer Grundlage," *id.* (1896), XVII, 374; and *Florian*, A. P. (1898), XVIII, 314. *Saleilles* borrowed this classification from him. See "Individualisation de la peine," p. 251 (English translation, Boston, 1911).

sentence is sufficient. For habitual delinquents prison is useless unless their segregation is for an indeterminate period, that is to say, "until proof of real amelioration." [1]

There is, therefore, on this point, a radical opposition arising from the existing systems of penality, diverse doubtless in the mechanism of their execution (which are, however, completely foreign to the sentence of the judge, and often even to the disposition of the statutes), but all based on the principle of the fixed quantity of penalty to be given by hundreds and thousands of doses, with relation to the crime rather than to the delinquent. Those systems are opposed to the positive penal system, based, on the contrary, principally on the segregation of the delinquent for an indefinite period as the logical consequence of the theory that the punishment must not be retribution for a fault through a proportioned chastisement, but rather a defense corresponding to the power of the delinquent to do harm and to his chances of social readaptation.[2] This principle of indeterminate sentence is not new, but it is only owing to the new scientific principles that it has become a part of an organized vital system. The proof of this lies in the fact that under the classical criminal and penitentiary theories it has always been atrophied and forgotten. Clearly, the idea of a justice which punishes such a quantity of fault by such a quantity of punishment counted in days and hours, is opposed, and very naturally so, to this indeterminate sentence. The latter, however, has for a long time been applied to the criminal insane in England, a country very scrupulous in regard to personal liberty. But in this case, as in all those where "a priori" oppositions are met, the following result takes place. The jurist meets every new proposition deduced from facts by some inductive general proposition, and believes that his general inductive proposition is sufficient of itself to discountenance the positive proposition. But this is going too fast if men have determined the inductions.

They are not revelations; they did not descend from Sinai, and, therefore it is hard to see why they "per se" have the power to

[1] A. C. A. C. (Genève, 1897), p. 343.

[2] We can find an absolutely false work for the arithmetical gradation of penalties in the logismographic attempt of *Medem*, "Das Problem der Strafzumessung," in the "Gerichtssaal" (1888), XL, p. 3. A complete review, accompanied by just criticisms from a positivistic point of view was made by *Olivieri*, in the "Archivio giuridico" (1890), XLIV, fasc. 6. On this subject, the works of Bentham on moral arithmetic and Giorja on injury and damages are well known.

overcome heterodox ideas. Man can alter a man-made rule, and he is justified in so doing if his modification is based on the experience of every day. Dogmatic and monosyllabic opposition must therefore be disregarded. New ideas must be discussed to see if they are true or false; but there is no touchstone by which the quality of ideas may be determined. The fundamental idea of law is a limit imposed by the necessity of life, and imprisonment for an indeterminate period in nowise contradicts it. In fact, every day, the indeterminate sentence is applied to the insane; it has been enthusiastically championed for recidivists and incorrigibles, on the principle of compensation. If the classical criminologists on one hand find an increased penalty just and necessary for him who twice commits a crime, it is logical that this increase be proportioned to the number of recidivistic acts, although each of these acts shows the constantly decreasing efficiency of the punishment; and thus the conclusion of unlimited detention is reached, although this results in life imprisonment and the return to the law of the Middle Ages. This is the thought of certain classical criminologists, who illogically and impractically refuse to accept this gradual increase because they refuse to accept at the beginning any special augmentation for a second criminal act.[1]

On the other hand, if the greater number of jurists now believe in the conditional sentence and the release of the criminal whose conduct seems to prove him reformed and no longer dangerous, the natural and logical consequence is that the unreformed delinquent, and more particularly he who is incorrigible, must undergo a prolonged sentence.[2] If this favor is granted to the individual who is no longer a source of danger to society, why should not an analagous protection be given to society with regard to the individual who continues to be a menace and a danger? Ortolan[3] and Roeder[4] uphold this, citing in favor of their position (in relation, it is true, to recidivists alone), Henke, Stelzer, Mohl, Reichmann, F. Grooz, von Struve, von Lichtenberg, Götting, Krause, Ahrens, Schliephake, von Mehring, Lucas,

[1] *Mathaeus*, 47, Dig. 1, III, 8; *Carmignani*, "Teorica delle leggi," III, Cap. XI, 2; *Tissot*, "Le droit pénal," pp. 443, 145.

[2] *Davesiés de Pontes*, "Les réformes sociales en Angleterre," R. D. M. (September, 1858), 134.

[3] *Ortolan*, "Éléments du droit pénal," 4th ed., 1, 1192, 1201, II, 1442, etc.

[4] *Roeder*, "Les doctrines fondamentales, etc.," trans., *Giner* (Madrid, 1877), p. 248.

Bonneville, Saint-Vincent, Conforti, Van der Does, among the jurists; Ducpetiaux, Ferrus, Thomson, Mooser, Füesslin, Diez, Valentin, and D'Alinze among those who have taken up the question of imprisonment. After the first period, the criterion of indeterminate detention or segregation, as a self-sustaining and fundamental principle of penalty, was first upheld by Boileau de Castenau and Despine.[1] It was later developed by many publicists in Germany.[2] These authorities have insisted on the evil and harm done by the systems of penality developed under the influence of the criminal schools of the past. And even Mittelstädt, guided as he was by no preliminary study of the natural laws of criminality, reached empirical exaggerations, such as the reëstablishment of corporal punishment by bastinade. Certainly corporal punishment is advisable under certain conditions, particularly for men whose fiber is as tough as that of born-criminals, and this is why we see a tendency to use it on many sides.

It has been proposed to use electricity as a punishment, which because of its mystery strikes the patient with terror, and which is in nowise repulsive.[3] The English Commission of Inquiry on

[1] *Boileau de Castelnau*, "Les maladies du sens moral," A. M. P. (1860), p. 537; *Despine*, "Psychologie naturelle," I, 645 and 711, 390.

[2] *Mittelstadt*, "Gegen die Freiheitsstrafen" (Leipsig, 1879), and "Für und wider die Freiheitsstrafen" (1882), II, 445; *Kraepelin*, "Die Abschaffung des Strafmasses" (Stuttgart, 1880); *Vilbert*, "Das Postulat der Abschaffung des Strafmasses und die dagegen erhobenen Einwendungen," Z. G. S. (1882), II, 473, A. P., III, p. 483; *Kirchenheim*, "Mittelstadt und Kraepelin," *id.* (1886), I, p. 403; *Ferri*, "Il diritto di punire come funzione sociale," *id.*, III, and "Nuovi orizzonti del diritto penale" 1st ed., pp. 45, 75, and 2d ed., p. 539; *Garofalo*, "Criterio positivo della penalità" (Naples, 1880), and "Criminology" (Boston, 1914); *Van Hamel*, "Rapporto al congresso penitenziario di Roma; sulla latitudine da lasciarsi al giudice nella determinazione della pena," R. C. (1884), p. 415, and "Actes du congrès pénitentiaire de Rome" (1887), I. 459; *Medem*, "Das Problem der Strafzumessung"; *Smolden*, "Die Freiheitsstrafen und die Besserungstheorie," in the "Preussische Jahrbücher" (1889), B, 48; *Liszt*," Kriminalpolitische Aufgabe"; *Rylands*, "Crime, Its Causes and Remedy" (London, 1889), p. 190; *Sommer*, "Zur Abschaffung des Strafmasses," in the "Centralblatt für Psychiatrie" (April, 1890); *Asabrott*, "Ersatz Kurzzeitiger Freiheitsstrafen" (Hamburg, 1890); *Von Zuker*, "Einige criminalistiche Zeit- und Streitfragen der Gegenwart," in the "Gerichtssaal" (1890), XXIV, pp. 1 *et seq.*; *Havelock Ellis*, "The Criminal" (London, 1890), pp. 258 *et seq.*; *Fourtoul*, "La philosophie pénale" (Brussels, 1891), p. 146; *Max Sternau*, "Die Abschaffung des Strafmasses," Z. G. S. (1893), p. 17.

[3] *Roncati*, "Compendio d'igiene" (Naples, 1876), Cap. XXXVII; *Bain*, "Mind and Body"; "The Science of Education." *Balfour Stewart* and *Tait*, "The Invisible Universe," cited by *Caro*, R. D. M. (1st June, 1883), p. 547, speaks of the use of electricity in punishment. See *Dallemagne*, "La pena corporale e le sue basi fisiologiche," S. P. (31 October, 1894); *Morrison*, "La scuola positiva nelle riforme penal inglese," *id.* (31 December, 1894); *Frenkel*, "Les corrections corporelles en Russie" (May, 1899).

the effects of the law of penal servitude, says in its reports, "Corporal discipline, formerly the cat-o'-nine-tails, and now the whip, in English prisons, is inflicted only for serious faults. Experience has shown that in many cases they produce excellent effect." [1] And yet it must be acknowledged that corporal punishment as a principal punishment, even in the least barbarous forms, is repugnant now to our sentiments of humanity, and also, too easily abused.[2] It can only be admitted as disciplinary for prisoners (as discipline it is impossible to do away with it completely, so that it had better be regulated by law, as was recognized in 1878 at the Congress of Stockholm), above all in the form of electric shock and cold douches, which have, apart from the pain they cause, therapeutic effects, which are a basis for their being required in ordinary hospitals and insane asylums. I therefore agree with Krichenheim in sustaining the propositions of Kraepelin for the indeterminate sentence already sought in Italy by Garofalo and myself,[3] and believe that they respond to the scientific spirit of modern criminal law. In an excellent article in the "Quarterly Review" of 1871, it is said, "When some serious robbery takes place the public makes a large outcry and issues complaints in all the papers, and demands what the police is doing. The latter could justly reply that it nearly always arrests the culpables, but that justice hastens to return them to society more given over to robbery than before and better instructed in the means of escaping the police."[4] But above all in these latter years, while a unanimous plebiscite finds fault with punishment of short sentences and propositions of conditional condemnation or suspension of sentence which are

[1] See R. C. (1880), p. 494. *Notton*, in "Corporal Punishment," "Prisons' Service Review" (February, 1897), confirmed this recently.

[2] For this, see *Gram*, "La pena corporale," in the "Rivista penitenziaria del nord" (1895), fasc. I, and "Revista penitenziaria" (1896), p. 642.

[3] *Garofalo*, "Criterio positiva della penalità," p. 72, and A. P. III, 1, "Ciò che dovrebbe essere un giudizio penale," insists that the abolition of every fixed means decided in advance be reserved, as I proposed before Kraepelin, to the single categories of habitual criminals, who should be isolated for an indeterminate period in special establishments. It is only in his "Criminology," that he adopted indeterminate sentence as a general principle. In "Il diritto di punire come funzione sociale," and in the first edition of this book (1881, p. 45), I wrote that "the period of segregation must not be determined" a priori "by the judge, but, on the contrary, it is in the province of the director of the special establishment, which I have for the delinquent, to decide upon a lifelong or temporary detention, depending upon a psycho-anthropological study of the prisoner. This idea is perhaps acceptable, but undoubtedly worthy of consideration."

[4] "The London Police," in the "Quarterly Review" (1871).

the consequence of this outcry, the principle of indeterminate sentence has been most amply developed and upheld in spite of feeble and unconvincing objections by Tallack, Wahlberg, Lamezan, Von Jageman, and Prius.[1] For it is easy to reply, in the first place, to the fundamental objection that indeterminate imprisonment is made in the name of personal liberty and individual rights, that it is already used for the insane who are imprisoned only for an indefinite period; and secondly, that in practice, thanks to the periodic revision of sentences, there will always be means of guaranteeing the personal rights of the prisoners who have become readapted to social life.

Apart from theory, we see that in America the principle of indeterminate sentence has been applied with good results in the reformatory at Elmira under the direction of Brockway, who has added to it a special course of physical and moral hygiene based upon a knowledge of the culpable, and consequently very efficacious. The system of indeterminate sentence, which all the Congresses of the National Prison Association of the United States — at Atlanta in 1887, Buffalo in 1888, Nashville in 1889 — have proposed as the general principle of punishment, has already been adopted in imitation of the institution, at Elmira, in Massachusetts, Pennsylvania, Minnesota, Ohio, and Illinois, and has been applied in the prisons of New York.[2] In conclusion, every culpable — if the act that he has committed and his personal disposition show that reparation for damage caused is an insufficient social sanction, — should be sentenced by the judge of condemnation to segregation for an indefinite period either in an asylum for the criminal insane, in a house of correction, or in a farming colony for occasional delinquents, either adult or minor. Secondly, the execution of this sentence — which by hypothesis would never be irrevocable

[1] *Van Hamel* held very positivistic views on this subject in his "Rapport au congrès pénitentiaire international de Rome" (1885), A. C. A. C. (1887), I, 100, but in a recent lecture entitled "Les sentences indéterminées," before the "Société des prisons de Paris" (published in the "Revue pénitentiaire," May, 1889), he endorsed Liszt's idea of a legal minimum and maximum, which, in my opinion, are contrary to the nature of an indeterminate sentence; it would be as well to establish a minimum and maximum for the insane. Van Hamel was adversely criticised at this and the following session (See "Revue pénitentiaire," June, 1889, and July, 1889, p. 1087).

[2] R. C. (1887), p. 103 (1889), p. 213; and "Proceedings of the Criminal Congress of the National Prison Association of the United States" (held at Nashville), (Chicago, 1890), pp. iv, 18, 76, 100, 107, 273.

— should be directed carefully by a further process no longer unattached as to-day from the work of the judge, but continuing it as a function of practical defense entrusted to special organs. The Commissions of Penal Execution ("Strafvollzugsämter") [1] composed of anthropologico-criminal experts, the judge, the attorneys for prosecution and defense, and the administrative officers, would continue to deal with the condemned. He would no longer be abandoned and forgotten from the moment that he has heard his sentence pronounced, unless pardoned, or else, upon coming out from prison, reappearing before the court, as happens every day. This would be a truly humane and efficacious work of protection, to the good of society, which would no longer fear the liberation of dangerous criminals, on a definite day and for the individual, who would not have to undergo until the end a condemnation of useless and exaggerated severity. The institution of probation is closely connected with that of the indeterminate sentence. This marks a progress which, accomplished already in England and Ireland, has appeared in much of the penal legislation of Europe and America. If this institution, however, is united with a fixed measure of punishment and if it is not related with the recognition of different categories of delinquents, it will not produce good effects, because the convict will be liberated mechanically at fixed periods, in accordance with the statute, without any regard to the prerequisite of good conduct. This is a general and very illusory guarantee, for, as the English Commission of Inquiry said in 1863, "It is evident that the good conduct of prisoners has a negative (lack of serious faults) rather than a positive value."

It can be easily understood, on the contrary, that conditional liberation organized under the opposite system of indeterminate sentence, would be granted only after a physio-psychological examination of the condemned, which would be personal and not a departmental examination of documents such as the examinations under the present penal laws. It would not be refused, as to-day, because of grave faults actually set forth in the statutes, but because of the personal character of the prisoner. It would not be accorded to incorrigibles nor to born-criminals or the criminal insane guilty of grave atavic faults, and consequently not readaptable to social life. Further-

[1] This is the name proposed by Liszt, who, however, did not include expert anthropological criminalists in the committee.

more, conditional liberation in the present system entails a surveillance by the police over the prisoner, who has been granted his liberty. The harm that this surveillance causes him and the inevitable obstacles which it opposes to his rehabilitation cannot be denied. It is clear, on the contrary, that under the system of indeterminate sentence the liberation of the condemned would take place with the certainty of his readaptation to the social environment, and would exclude the vexatious or useless measure of special police surveillance. There is not much to be expected of the present societies for adult ex-convicts, for in spite of their many humanitarian exhortations and sentimental declarations, they have until the present (inevitably) been generally inefficacious. The ordinary defect of not classifying delinquents and consequently those liberated conditionally, has been and still is the inevitable reason of the uselessness of the efforts of prison societies. For if occasional delinquents, actually capable of reform, are not separated from the others, all citizens will prefer inevitably, and very justly, employees who have remained honest in spite of their poverty, particularly in preference to habitual and incorrigible delinquents. As a matter of fact, societies make no difference between these classes. Prison societies will not become vital unless they take part in the criminal clinic of university students, judges, and lawyers.

§ 331. B. Reparation in Damages.

The second fundamental principle of a positivistic system of social defense against crime is reparation in damages. The positive school has already called attention to this by radical theoretical and practical propositions. Reparation of the harm suffered by the victims of crime can be considered from three points of view:

I. As an obligation of the delinquent to the injured party;

II. As a punishment in place of imprisonment for petty crimes committed by occasional delinquents;

III. As a function of the State in the direct interest of the injured party and in the indirect but no less real interest of social defense.

The latter two forms of reparation for harm done are the special work of the positive school; the second under the initiative of Garofalo and Puglia, the third based on my proposal, which, requiring a more radical innovation of principle, met

great opposition at the hands of classicists and eclectics. In the "Diritto di punire come funzione sociale" [1] I wrote, "None can object that civil reparation is not a penal responsibility, because, in the first place, there is no difference between the payment of a fine and reparation, and, above all, because an error has been made until the present time in the separation of civil from penal means, for they both concur in the defense of society by preventing certain dangerous or harmful acts." At a later point, enumerating the means of social defense (preventative, reparative, repressive, and eliminative) I added, "But our innovation is not only theoretic, because in the greater number of cases, this obligation in damages is established; it must be practical, in the sense that, by the non-separation of civil from criminal means, it will be of more general application and will demand procedural doctrines to establish special and more suitable forms and organs for this category of measures, by obligating, for example, the criminal judges by the liquidation of damages to suppress the length and delays of a new civil process, and, by obligating the representatives of the district-attorney's office to demand, when the victim of the crime, either through ignorance or fear, fails to do so, a judgment in damages. The result will be that the fear of the loss of some hundreds of dollars will render the rich more circumspect (in regard to involuntary crimes). If the defendant is poor, we must suggest the substitution of labor for the victim, whether an individual or society, in place of damages." Soon after Garofalo wrote, "According to our school, in many crimes, especially in petty crimes, the punishment of a judicial imprisonment or arrest can well be replaced by an effective reparation of damages as a satisfaction to be given to the victim. Reparation in damages can be an actual equivalent of punishment if, in place of being as it is to-day a legal consequence, a judgment to be collected according to the rules of civil procedure, it becomes an obligation from which the defendant cannot escape." [2]

It was Garofalo, again, who insisted more than the other positivists on these ideas, developing them by a practical procedure of reforms.[3] The idea which we advance has made much progress.

[1] Preliminary lesson in the University of Bologna, published in "Archiv. di psich." (1882), III, fasc. 1.

[2] *Garofalo*, "Ciò che dovrebbe essere un giudizio penale."

[3] *Garofalo*, "Criminology"; "Discussione al congresso penitenziario di Roma" (23 November, 1885), "La riparazione alle vittime del dilitto" (Turin, 1886); "La riforma della procedura penale" (with *Carelli*) (Turin, 1889); "Rapport sur

It has been fully discussed in books and in the meetings of societies, beginning with the first Congress of the Clinical Anthropology in Rome, in 1885, when it appeared on motion of Fioretti in a resolution by Ferri-Fioretti-Venezian, as follows: "The Congress, convinced of the importance of insuring civil reparation in damages, not only in the immediate interest of the party, but also in the immediate interest of preventive and repressive social defense against crime, expresses the hope that positivist legislation will, at the earliest possible moment, employ the most suitable means or process against the authors of harm, their accomplices, or abettors, by considering the effectuation of reparation as an official social function of the district-attorney during the trial, the judges in the sentence, and the prison administration in regard to the eventual compensation by prison labor and petitions for conditional liberation." [1]

The classical principle that reparation of damages occasioned by crime is a purely civil and private obligation of the delinquent (similar to that based on breach of contract) and that it must be, therefore, entirely distinct from the penal sentence, has resulted in the complete disappearance of reparation in the daily judicial practice; for the victims obliged to bring civil suit with advance of costs, and to undergo a civil trial, abandon the hope of an easy and sure indemnity for the moral and material harm that they have undergone, and content themselves more and more with some poor settlement as a purely voluntary concession on the part of the delinquent; hence, a recrudescence of private vengeance and a deplorable loss of confidence in the reparatory work of social justice. In the realm of theory, both for law and procedure, thanks to the customary complication of scientific tariffs and the illogical and absolute

la question 'Mesures pour restreindre le rôle de la prison dans la répression des infractions légères,'" B. U. I. D. P. (May, 1889); "Relazione al III[e] congresso giuridico" (Florence, 1891).

[1] *Fioretti*, "Des meilleurs moyens pour obtenir le dédommagement du crime," A. C. A. C. (Rome, 1886), pp. 349, 363 *et seq.* The same question was advanced in the first and third meetings of the International Union of Criminal Law (Brussels, August, 1889), in the International Penitentiary Congress of Paris (1895), and of Brussels (1900), before the "Société des prisons de Paris." Report by *Brunot*, "Moyens pratiques d'assurer à la victime du délit l'indemnité," in the "Revue penitentiaire" (February, March, April, May, 1898), before the Congress of German Jurists (1893), on the remarkable report of *Jelisch* completed by the data of the comparative history of legislation; and to the Third International Juridical Congress at Florence (September, 1891), which approved the proposition made by Garofalo, recommending the institution of a fund.

separation between civil and penal law, the penologists have taken no account of reparation in damages, leaving it entirely to the theoretical authorities on civil law. The latter, in their turn, have neglected it in the case of crimes for the practical procedural guarantees, looking upon it as an accessory of little importance, which should be considered by the students of penal law.

There have been, it is true, certain isolated demands which have met with no result; and only the absolutely new method introduced by the positive school can give this institution a new lease of life.[1] But it is not necessary to deal here with the reparation in damages in relation to the practical procedural methods which will render it more efficacious. At this point, the question of principle alone will be dealt with.[2] With the essentially public nature of the social function of reparation, it is immoral to confuse the obligation of the delinquent to repair the harm he has done by his crime with that derived from breach of contract. There is no difficulty in the recognition of the principle which we followed, except mental habits born at the end of the Middle Ages, and a regular establishment, for economic reasons, of the district-attorney's office, habits, however, to which the Greek and Roman traditions with their distinction of public and private crime, can be opposed. Just as crime determines a social reaction under

[1] Apart from the suggestion of *Bentham* in his "Principles of the Penal Code," Chap. IX, and the remarkable arithmetical propositions of *Gioia* in "Ingiurie, danni e soddisfacimenti," *Spencer*, particularly in his "Political Essays" on prison morals, took up reparation to regulate penal sanction. Even in 1847, Bonneville de Marsagny, with admirable common sense, stating that the private damage caused by crime was almost never paid, made these remarkable propositions: "The Court must fix the amount of the damage. — It must give the victim a lien upon the goods of the condemned. — Indemnity must be required by the State to defray the expenses of justice. — Pardon must never be granted unless the damage is repaired (the family of the condemned being responsible). — A part of the earnings of the condemned must be set aside for the victim. — Prescription can only be permitted (as under the Austrian Code) when the harm has been remedied and the criminal has gained nothing by his crime." *Bonneville*, "Réparation civile en matière criminelle," in the "Revue pénitentiaire" (1847), IV, 444.

[2] With the same thought, Franchi held that labor in penal farming colonies must not be paid to the condemned, but the product, after the expenses of his keep have been paid, should go into a fund to repay the victims of crime. He showed that this is a means for the civil education of the collective conscience, both because it thus learns that crime is an act which harms society as a whole, and because it no longer considers the isolated author of an offense, but the entire mass of prisoners, which tends by its work to undo its wrongs. Thus will arise a feeling of great pity for criminals considered as affected by a psychic disease. *Franchi*, "Il progetto Giolitti per il lavoro dei condamnati all' aperto e il diritto penale" (January, 1903).

the form of indefinite isolation of the delinquent when the act is serious and the delinquent dangerous, so it must result in a defensive social reaction in the form of reparation in damages, to which may be added isolation, if necessary, or which may be sufficient of itself, when it constitutes a sufficient defense, that is, when neither the act is serious nor the agent dangerous.

When the obligation to repair the harm done without civil suit can exercise more efficacious repressive force than the board and lodging gratuitously allotted to the defendant for some days or weeks in a State prison, it falls naturally into two divisions: that of an indemnity or fine paid the State, and that of indemnity paid to the victim. We can go further, and add that the State should take into account the rights of the victim, paying him an immediate satisfaction, especially when blood has been shed, looking to the offender to reimburse it for its expense, as well as for the expense of trial.[1] Penal evolution, as we have said, is a decisive proof of the necessity of such reforms. At first, reaction against crime was an exclusively private affair; then its severity was mitigated, and it took the form of a pecuniary settlement, one part of which went to the State, which soon took the balance of the compensation, leaving the injured party the poor consolation of demanding and obtaining indemnity before a different court. Nothing, therefore, is more in accord with this evolution of punishment and the reform which we demand for the reparation of damages, which we look upon as a public-private function, the equally juridical and social consequence of the commission of crime. The establishment of a fund to meet the indemnity formed by the interest of the fines and indemnities perhaps, refused by the victims, will be the final and complete recognition of this principle. The classical principles dominant to-day constitute, on the contrary, a pleasing outline rather than a serious organization of penal justice. When citizens pay taxes to the State, it is with the hope of receiving public services from it in exchange, the first and most essential of which is public safety, and, in fact, the State expends for this supreme social function hundreds of thousands of dollars every year, and yet upon the commission of every crime a grotesque scene takes place.

The State, negligent in not having taken more precautions against the crime and more care for protection of its citizens, arrests

[1] *Lioy*, A. C. A. C. (Rome, 1866), p. 377, in the "Nuova scuola penale" (Turin, 1866), p. 43; *Féré*, "Dégénérescence et criminalité," Chap. XIII.

the culpable (when it does arrest him, for sixty per cent. of the known crimes go unpunished) and in the forty per cent. of the known crimes in which the arrested individual is condemned as the author of the misdeed, the State, which must defend the superior interests of absolute justice on behalf of the public, does not concern itself with the injured party, but abandons him to his prosaic private interest and a distinct civil court. On the other hand, it makes the delinquent pay a fine to the public treasury, even when the crime is, for example, a robbery or harm done to private property. Thus the State cannot prevent crime, cannot repress it, except in a small number of cases, and consequently fails in its duty for the accomplishment of which it receives taxes from its citizens, and then, after all that, it accepts a reward; and over and above this, it condemns every ten years some 3,230,000 individuals,[1] the greater part of whom it imprisons, putting the expense of their maintenance on the back of the honest citizens whom it has neither protected from nor indemnified for the harm done by the crime; and all this in the name of the eternal principles of absolute and retributive justice. It is evident that this manner of administering justice must undergo a radical change. The State must indemnify the individuals for the harm caused them by crimes which it has not been able to foresee or prevent (this principle is recognized partially in certain public disasters by remission of taxes or pecuniary aid). It then will be free to place the damages upon the delinquent by the means already given, and to demand from him the expenses which his crime has necessitated in order to pay the salaries of the judges and watchers, and to meet the indemnity of those who suffered by it. In this way alone will the State, obliged first of all to repair at its own expense the damage caused, be aroused by its natural fiscal instinct to keep its eyes open and to more rigorously obtain reimbursement from the condemned and in this way alone will the principle of social solidarity be recognized, not only against, but also for, the individual, who, according to positivist belief, must always answer for crimes of which he is the author and be indemnified for those of which he is the victim. Thus it is clear that in the positivist system of social defense against crime, which aims at a more efficacious protection of society and the individual, reparation in damages takes on the character of a fundamental principle. Just as the

[1] The number of condemned in Italy from 1880 to 1889.

segregation of the criminal for an indeterminate period has been established as a fundamental regulation, regardless of practical measures of detention and imprisonment, so reparation of the harm done by the crime is reëstablished as a fundamental regulation, regardless of what procedural measures guarantee and effect it. And in this fact itself are found the radically new methodical criteria which criminal sociology, relying on the data of anthropology and statistics, substitutes for the traditional criteria of the classical criminal and penitentiary schools.

§ 332. C. The Choice of Defensive Means for Different Categories of Delinquents.

The two fundamental principles of the positive system of social defense against crime would, however, be incomplete unless they were complemented and rendered practically applicable, not so much by more or less opportune disconnected propositions as by another general rule which serves as a stepping-stone to the practical organization of social defense. This rule is the choice of defensive measures with regard to the anthropological categories of delinquents. On this point, as on all others, the classical belief is in direct opposition to ours; for its ideal is unity of punishment, and on this point harmony reigns not only among the theoretical jurists, who, if we are to believe Beltrani Scalia,[1] take too exclusive a part in the discussion of the penal systems in the proposals for an Italian penal code, but also among the practical authorities on prisons, to whom, on the contrary, if we are to believe Liszt,[2] a too exclusive part in the discussion of the same problem has been given in Germany. However, the report on the last proposal of an Italian penal code[3] frankly reached this conclusion — that "elsewhere the tendency which prevails in the legislation of the most civilized nations is to reduce imprisonments to the smallest possible number, while approaching constantly the ideal desired by those who are the most expert in prison matters, unity of punishment."

It can be easily understood that such would be the idea of both criminologists and penitentiarists from the moment that they both considered the delinquent as a mean and abstract type, or an algebraic term to which the first applied an article of the penal code, and the second assigned it a more or less

[1] *Beltrani Scalia*, "La riforma penitenziaria in Italia" (Rome, 1879), p. 48.
[2] *Liszt*, "Kriminalpolitische Aufgabe," 487, 488. [3] 1887, I, 78.

monastic cell. This explains, also, why in propositions of reform, such as conditional reparation and conditional sentence, the differences of type among delinquents are often forgotten in thinking of the nature of the misdeed and the penalty rather than the physio-psychological qualities of the malefactor. Furthermore, it can easily be understood why the positivists look upon the simplification of punishment, even if it is imprisonment, as an absurdity, because it is in direct opposition to the undeniable positive fact of the difference which exists between the categories of delinquents:[1] that it must be a relation of homogeneity between the remedy and the evil is a natural law. Du Mesnil said, "A prisoner is a patient more or less curable of a moral kind (and I add of a physical kind) and consequently, the great principles of the art of medicine must be applied to him, and diversity of remedies must oppose diversity of ills."[2] And yet, on this point, besides an excess of uniformity, the opposite excess, under the name of the individualization of punishment, must be avoided. This is popular with the American penitentiarists who enthusiastically demanded it after the publication of Saleille's book.[3] Of course, every criminal clinic must aim to apply to every individual convict a particular course after having made a physio-psychological study of him and the conditions which have led him to crime. But this is still impossible, above all, in countries where the number of prisoners is very great, or where the officials in charge are not students of biology and criminal psychology. It is impossible for a manager who has at one time all the administrative anxiety and financial responsibility to individualize the discipline of four or five hundred prisoners.

The cellular system, which reduces the characteristic manifestations of personal autonomy of the prisoners to a minimum, bringing them all under a uniform rule of routine, makes it impossible to observe and study the special character of every

[1] Our principle is already applied. See, *Vincens*, "Notices individuelles sur les jeunes détenus (pour les classer d'une façon rationelle dans les divers établissements pénitentiaires)," in the "Revue pénitentiaire" (1895), p. 33. In France, "an amendment division" has been established for the less hardened adult delinquents. *Laguesse*, "'Les quartiers d'amendement' des maisons centrales," *id.* (1895), p. 274, and *Cuche*, *id.* (1895), p. 327.

[2] *Du Mesnil*, "Régime et système pénitentiaire," A. H. P. (1871).

[3] *Saleilles*, "Individualization of Punishment" (Boston, 1911). Before this publication, however, *Cuche* had written "L'avenir de l'intimidation," in the "Revue pénitentiaire" (1894), pp. 786 *et seq.*; and *Rivière*, "Du rôle de l'individualisation dans l'exécution des peines," p. 1044.

prisoner in order to give him a special discipline. No warden or assistant would be capable of fulfilling so delicate and difficult a function. It is an admitted fact that certain penitentiaries flourish when they have the good fortune to possess a warden who naturally is a psychologist, such as De Metz, Crofton, Roukawichnikoff, and the Abbé Spagliardi, and fail when such directors die or leave. This is the most eloquent proof that the whole secret of penitentiary success lies less in the magic virtue of a cellular prison than in the prudence and psychological penetration of the warden.[1] Just as a bad law, applied by conscientious and intelligent judges, is better than a monumental code applied by poor judges, so a well worked-out penitentiary system confided to incapable persons effects less good results than a less ideal system under good management. Since this question of the choice of personnel is always difficult, above all for financial reasons (for save in very rare exceptions, good personnel cannot be obtained without good pay), in order to avoid inevitable faults it is necessary to substitute for the unreliable theory of individualization the criterion of classification, which gives the merits of the other principle a more easy and practical realization.[2] It cannot be said that the anthropological criminologists do not agree upon a classification, and that consequently an actual basis is lacking for this fundamental criterion, for as I

[1] *Despine* in "Psychologie naturelle," III, pp. 387 *et seq.*, develops a penitentiary régime founded on the data furnished by psychology, but with exaggerations and illusions which cannot be accepted.

[2] These ideas, already expressed in the third edition of his work, (1892), p. 708, show the slight foundation of the criticism of the positive school by Tarde (in the preface to *Saleilles*, "L'individualisation de la peine," p. 5), where it is said that when "the positivists (naturalistic or socialistic), seek the causes of crime they discover only impersonal factors such as climate, season, cranial anomalies(!), or suggestions of environment; they naturalize or socialize crime. And when there arises a question of penal application of their theory, it is astonishing to see how they push the individualization of punishment to the limit, as if the individual, in place of being nothing, had become all." The truth is that the positivists have always the personal (organic and social) as well as the impersonal (telluric and social) factors of crime; and in place of ideal extreme individualization they have advanced the practical criterion of classification, that is, a penal discipline suited to each bio-sociological class or subdivision of delinquents. This was recognized by *Grundtwig*, "Individualizzazione e i mezz. per realizzarla," in the R. P. N. (1894), fasc. I, and "Revue pénitentiaire" (1895), p. 150; *Liszt*, with *Seuffert*, at the meeting of the International Union of Penal Law in Heidelberg, June, 1897, upheld this idea of classification, as the end of individualization, although both were, he said, "too far from the legal concepts of judge and authorities." See also *Rivière*, "Du rôle de l'individualisation." The principle of classification has been proposed by the Committee for prison reform in England. See

have shown, not only the differences on the subject of diverse classifications are not only unessential and merely formal and secondary, but in the second place, all students agree more and more to accept the classification which I have proposed.

§ 333. Prisons must be Hospitals where Delinquency is Treated.

Let us now consider a practical positivist system of social defense on the basis of an anthropological classification of delinquents, regarded as the first criterion, with the crime as a secondary consideration (for it is not the crime in the delinquent, which must be punished, but the delinquent because of his crime). But, before taking up these practical propositions, we must outline the rules common to all the many forms of defensive organization. First of all, the common and fundamental character of all the different establishments, where delinquents for whom reparation in damages is not a sufficient punishment are isolated, must change from prisons, or places of torture and slavery, into establishments of physical and moral treatment, with discipline suited to the diverse forms of criminal tendency, similar to hospitals, special clinics, and insane asylums.[1] From a juridical point of view, they will have but one end — the segregation of individuals temperamentally unfit for social life. From a technical point of view, their purpose will be twofold; first, to utilize to the best advantage, for society and the individual, the labor of delinquents not readaptable to social life, by reducing physical constraint to the minimum necessary to prevent criminal excess and giving predominant importance to regulating their activity to hygienic and psychological dynamics. As to delinquents readaptable to social life, their hygienic and productive activity must be developed in the fashion best suited to develop and fortify their intelligence and will, in conformity with the data of physio-psychological and psycho-pathological pedagogy. Furthermore, the easiest measure for their legal rehabilitation will be taken, as has already been begun in some civilized countries.[2]

Rinieri de Rocchi, "La classificazione dei delinquenti e il rapporto sulle carceri inglesi," in the "Scuola positiva" (September, 1895). Dr. Orange introduced the criterion of classification in the asylum for the criminal insane at Broadmoor. See *Lombroso*, "L'uomo delinquente," III, 556.

[1] See to this purpose, *Vargha*, "Die Abschaffung der Strafknechtschaft" (Gratz, 1896, 1897). Long prior to this *Wyrouboff*, in "De la pénalité" (concerning a work by *Girardin* in the "Philosophie positive," 1871), "I am in favor of the abolition of penal servitude, which is doomed like slavery and feudalism."

[2] For example, the Danish law of 13 April, 1894, allows full rehabilitation in

§ 334. Prisons Must Not be Places of Ease.

In the second place, precautions must be taken to avoid making the establishments where the guilty are isolated, instead of places of privation, places of ease and criminal association, as they are too often to-day. Romagnosi said very strongly that punishment loses all its force when experience shows that it is less severe than expectation had painted it. D'Olivecrona, Lombroso, and Beltrani Scalia, among others insist upon this point. A generous reaction against the horrors of prisons in the past, has resulted in an exaggeration of the ease of ordinary prisoners (atavic criminality), although it has increased the severity against those of a political or social character (evolutive criminality). At the Penitentiary Congress at Rome in 1885, for example, a motion was approved to amuse prisoners, even those convicted of murder and rape, with music on Sundays; and Luigi Lucchini proposed to provide those confined in cells with means of sexual intercourse at the expense of the State, in order to avoid the dangers of masturbation.[1] But, after examining further the social conditions and differences which must be made between the honest and dishonest, it will be seen that the establishments of isolation, which, far from being places of torture, and while furnishing means of physical and psychical betterment, must always be undesirable for their inmates. For, to-day, during the rigorous seasons of the year, their state is a manifest injustice, dangerous to the last degree, because they are objects of envy to the honest laborer, badly clothed, badly nourished, and miserably housed.

§ 335. Universal Necessity of Working in Prisons.

In the third place, the obligation to work must be universal and absolute. Under the existing system, the State keeps in idleness those whom it has condemned to hard labor, with the result, as Spencer pointed out,[2] that crime is to the advantage of the culprits, who obtain board and lodging free, while it is a double loss to the honest, who not only suffer from the misdeed but must contribute largely to the support of the evildoer. It

certain cases. So the Belgian law of 25 April, 1896, and the French of 21 February, 1891. See *Passez*, "Réformes à introduire dans la loi sur la réhabilitation," in the "Revue pénitentiaire" (April, 1898).

[1] See "Uno spiritista del diritto penale," p. 28, and *Ferri*, "Studii sulla criminalità ed altri saggi" (Bocca, Turin, 1901).

[2] *Spencer*, "Political Essays."

is impossible to see how crime can free a man from the necessity of working for his daily bread — a necessity to which he was subject before his misdeed and to which all honest men are subjected. We can point out, however (without speaking of the hygienic efficiency of labor shown by daily experience with the ordinary insane), that this is the only means of solving the external question of the competition of prison and free labor. For, if the prisoner must either labor or remain idle, there is but one choice, that he should work. The difficulty is first avoided by making the prisoners work in the industries which compete least directly with free labor; second, by giving them full compensation, but deducting their board, clothing, and lodging, and repaying in full or in part their victims for the harm done them.[1] The maxim that labor is the price of life, true for all human beings save children and the sick, should be engraved on the portal of every prison.[2]

[1] The International Prison Congress in Paris (1895), on the contrary, resolved "that the prisoner has no right to salary, but that it is to the interest of the State to give him something." "Revue pénitentiaire" (1895), p. 1019. This is the old inefficient system.

[2] I have treated these two questions in "Lavoro e celle dei condamnati."

CHAPTER VI

PRACTICAL REFORMS (*Continued*)

Insane criminals and asylums for the criminal insane. Born-criminals, the death penalty, deportation, indeterminate segregation. The cell-system is one of the aberrations of the XIXth Century. Labor in the open air in agricultural colonies. Habitual criminals. Criminals by occasion and the abuse of short term detention. Criminals by passion and their relative impunity.

§ 336. Insane Criminals and Asylums for the Criminal Insane.

As far as insane or semi-insane individuals are concerned, after the isolated propositions advanced during the last half century by several alienists (among them Georget [1] and Brière de Boismont [2]), a complete literature has developed in favor of asylums for the criminal insane, while but few voices have spoken for the objections and reservations, which have almost entirely ceased among the alienists. These asylums, first begun in England in 1786 and more efficiently organized in 1816, with the mad-house at Bedlam (because of three attempts at political assassination by insane men in rapid succession), are still active and successful. So are the asylums at Dundrum, in Ireland, founded in 1850; Perth, in Scotland, founded during the same year, Broadmoor, in England, founded in 1863, and those in Pennsylvania, New York (founded in 1874), and in Canada, founded in 1877. On the Continent, there is no asylum for the criminal insane, properly so called. France, after trying to congregate the criminal insane at Bicetre, established in 1876 a special department for them in the penitentiary at Gaillon. Holland has devoted the asylum at Bozmalen to convicts who go insane.

Germany has assigned special departments for this purpose in the institutions at Bruchsaal, Waldheim, Halle, and Hamburg. Italy created a special section for the criminal insane

[1] *Georget*, "Nouvelle discussion médico-légale sur la folie" (1829), p. 73, cited by *Legrand du Saulle*, "La folie devant les tribunaux" (Paris, 1864), p. 65.

[2] *Brierre de Boismont*, "De la nécessité de créer un établissement spécial pour les aliénés vagabonds et criminels," A. H. P. (1846), Vol. XXXV, p. 396; "Les fous criminels à l'Angleterre," *id.* (1869), p. 382.

in the penal institute at Aversa, in October, 1876, and a more complete asylum in Ambrogiana at Montelupo, in Tuscany, and later one at Reggio-Emilia, but these were devoted to convicts who went insane only, and an observatory section for the study of those under arrest suspected of insanity. Since then, legislatures in France and Italy have proposed to establish true asylums for the criminal insane in France by the statute of November, 1882, in Italy by that of March, 1881, amended in April, 1884. The "inquiry into legislation relative to insane delinquents," [1] undertaken by the "Société générale des prisons," shows that in Italy (until 1890), in France, Germany, Austro-Hungary, Croatia, Belgium, Portugal, and Sweden, delinquents released for insufficient proof or acquitted because of insanity, while removed from the judicial sphere are subjected to the more or less regular and diligent care of the administrative authority — but in England, Holland, Denmark, Spain, and Italy (since 1890) the judiciary are authorized and often bound to confine such individuals in asylums.

§ 337. Asylums for the Criminal Insane. Objections. Expense.

And now, as the practical organization of asylums for the criminal insane cannot be taken up here, I will reply only to a few of the main objections which have been advanced, and show what individuals should be so confined. Those objections which relate to the enormous expense need not be considered, for a misunderstood economy of a few hundreds of dollars should not be allowed to entail grave material and moral harm. And likewise the hypothetical bloodshed arising from the congregating of the insane in one place can be disregarded. If such scenes take place among the insane it is better for them to occur within the walls of asylums rather than at large to the harm of useful and honest citizens. Furthermore, if the establishment is well-organized and distinction made between the different classes according to character, precedent, disease, and so on (for, of course, the separation of individuals into categories is essential in all establishments of this kind) [2] it will greatly reduce the

[1] In the B. S. G. P., from Dec., 1878, to March, 1879, and "Revue pénitentiaire" (May, June, 1897). See also *Herbelot*, "Sur la législation des aliénés dangereux" (March, 1883); *Roussel*, "Rapport au Sénat pour la revision de la loi sur les aliénés," 2 vols. (Paris, 1884).

[2] This rule is observed at the asylum for the criminal insane at Ambrogiana, directed with scientific and practical knowledge by Dr. Codeluppi, where remark-

present number of such occurrences both within and without asylums, where, however, they attract less attention because they are scattered or attributed to inmates who are sane.

Two more serious objections are made to asylums for the criminal insane, and they are repeated by some of our opponents with an obstinacy worthy of a better cause. In the first place, an attack is made against the weaker side of the dilemma, and it is said that whoever has done violence is either insane or guilty. If he is insane, say Fabret, Mendel, and others, then it makes little matter that he has to do with justice. There is no crime on his part because he is "non compos mentis." He should be put in an insane asylum, and, if he is dangerous, he should be subjected to special discipline, as are all other of the dangerous insane although not charged with any crime; or, on the other hand, the author of the crime is guilty, and then he should be put in jail. Our answer to this is simple. In the first place, the dilemma is not real, because it does not include the intermediary cases in which abstract logic itself recognizes, as Carrara said,[1] the necessity of an intermediate segregation, half-way between that of the asylum for the criminal insane and that of the prison. But above all, the first alternative, which deals with the actual insanity, is not enough to do away with the need for such asylums, for, while it seems very simple to say that if the agent is an ordinary non-delinquent insane patient, he must go to an asylum, yet if he is an insane delinquent special measures should be taken in place of trusting to the present system, which allows the administrative authorities, whom one cannot accuse of having too much knowledge or too much heart, to take care of the insane sent to them during trial or after judgment.

The inadequacy of this system is shown by sad and frequent examples when new crimes are committed by individuals who have been freed for the first delinquency either immediately after trial or after a short detention in an asylum because of their infirmity.[2] At most it can be said that it is not necessary to have special establishments, but that it is sufficient to set aside special sections in

able order reigns. Many convicts work in squadrons out of doors (within walls, however), and each squadron is guarded by an armed man.

[1] *Carrara*, "I periti alieniste nel foro," in "Opuscoli," Vol. VII, p. 141.

[2] In "l'Omicidio" (p. 712), I gathered many cases of insane murderers, who, hardly out of the asylum, committed new murders. See, also, *Monad*, "Aliénés recueillis après condamnation dans les asiles publics de 1886 à 1890," in A. M. P. (March, 1895).

ordinary insane asylums, and that in this way the indignity to the families of the non-delinquent insane is avoided, an indignity which so many people now consider infamous. And yet, against the division into special sections there are practical reasons of order and discipline, for it presents disadvantages which experience has already shown. There is, also, a principle involved as well as practical reasons, for while, as Fabret says, "The supposed delinquent must, from the moment when he is recognized as insane, cease to be considered as a delinquent, and be dealt with purely and simply according to criminal law." Two considerations must be made on the other side of the question. First, he cannot be "purely and simply" considered by criminal law, because, while he is insane, he is distinguishable from other insane patients, in that he has committed murder, rape, arson, or robbery, and the others have been and still are harmless, and criminal psychology shows that the criminal insane's idea of punishment [1] is analogous to that which the delinquent and not the ordinary insane entertains. Furthermore, the reasoning which we attack belongs to an order of ideas, which science is rapidly eliminating, — the theory that insanity is a misfortune, while crime is an evil exercise of free will. This is not true.

Just as it has been admitted for more than a century, contrary to the belief of the Middle Ages, that insanity does not depend upon free will, so to-day we must recognize that crime has nothing to do with moral liberty. Crime and insanity are both misfortunes. They both should be treated without resentment, although we must protect ourselves against them. So this objection that the supposed delinquent, when insane, must be dealt with according to criminal law, cannot be upheld against the principles of the positive school. He, like the true delinquent, must be dealt with according to defensive law. This same reason we believe overcomes the second, and last, serious objection according to which an insane man cannot be, simply because he has committed a murder, imprisoned for life, "in the good pleasure of His Majesty" as the English say, who, however, are very proud of their writ of habeas corpus when the liberty of sane citizens is in dispute. From the moment that he is cured, even if his term of imprisonment in case of condemnation has not expired, he must be freed. Our answer to this is negative. Psychiatry

[1] *Saccozzi*, R. C. (April, 1888).

upholds us by proving the considerable proportion of relapses in all kinds of insanity, and especially in certain particularly dangerous forms. Experience upholds us, also, by showing the frequent new crimes committed by the insane, who, however (were it only for financial reasons), cannot be justly kept in an ordinary insane asylum after they appear completely cured; and we answer juridically by the principle of social defense proportionate to the dangers which may be feared at the hands of the delinquent whether insane or not, that while the danger continues the protection must also continue. This applies to all grave crimes, such as murder and arson.

As to the semi-insane and the petty delinquents, to those who have committed theft or been guilty of slander, these can be given their freedom after having been treated and after having shown the signs of amelioration, except in cases where their mental diseases can transform them into dangerous delinquents (such as epilepsy and the delirium of persecution).[1] Mancini made a declaration which conforms to the principles of the classical school when he said, "I cannot understand how the very court which the law forces to give a judgment of acquittal when the jury has declared that at the time of the commission of the crime the accused was not in possession of his reason and was consequently irresponsible, can, at the same time, order his forced confinement for any time whatsoever in an insane asylum — is it because he has committed a crime? That is patently untrue, he has committed no crime (in the meantime I would say here that the victim is dead, and that others may die from his acts) because he did not know what he was doing, and had no consciousness of his acts, and for these very reasons has been declared innocent before the law and irresponsible; there can therefore be no reason to deprive him of the exercise and enjoyment of the liberty which is not refused to other unfortunates afflicted with the same mental diseases." [2] This is

[1] *Lunier*, speaking of "Des épileptiques et des moyens de traitement et d'assistance qui leur sont applicables," A. M. P. (1881), I, p. 217, says that in France only about fifty-two hundred sane or insane epileptics are in public or private asylums out of a known thirty-two thousand; about twenty-eight thousand remain with their families. Thus it is easy to see how epileptics are the authors of crimes. For Russia, see *Marro*, "I caratteri dei delinquenti" (Turin, 1887), p. 51, and *Ball*, "Les persécutés en liberté," R. S. (December, 1889).

[2] *Mancini*, "Discorso in risposta all' onorev. Righi" (Rome, 1877), p. 14. To the same effect Attorney-general *Heinor*, in the discussion before the Société

in conformity with the abstract juridical principles of the classical school, but not, we believe, with the exigencies of social preservation, nor, consequently, with those of criminal sociology. And it shows one of the numerous dangers encountered by grafting psychiatry without due thought upon the old trunk of penal law.

For, this is what happens: at the trial, the progress of psychiatry is invoked to show that the murderer is insane, which is all very well, but if the psychiatrist or the positivist declares that the ascertained insanity, far from doing away with the danger, only augments it, then the abstract principles are invoked and meanwhile the danger to society remains. The objections on the ground of principle against asylums for the criminal insane are based on classical theories and the idea of moral responsibility considered as a condition for defense of society; consequently they are valueless for the reasons which we have given before. Soon after the year 1700, when the criminal insane were either hung or burned, certain criminalists, revolutionary in their day, claimed that, on the contrary, they should be cured; then, when they were hardly cured or merely in some lucid interval, they were tried and condemned as criminals. In our day this proposition seems strange, but it was the forerunner of the change that Beccaria so fortunately effected. As this idea is accepted to-day by almost all classical criminologists, althoughit is in plain contradiction to their principles, it enables us to foretell with certainty the triumph of our ideas in the near future, since they are based on fact. And now, in order to conform to the principles of the positive school, it is clear that since asylums for criminal insane are fundamentally, like prisons, only means of isolating the individual from society under a special clinical régime, suited to the special psycho-pathological conditions of the inmates, we must segregate all the insane who have been found guilty of crime, or at least, if the financial difficulties are too great, all the insane authors of grave crimes. In a procedure such as I have sketched above in conformity with our ideas there would be expert testimony followed by a sentence of confinement for an indefinite time, according to the crime and the psychopathic forms of the delinquent, with the guarantee, of course, of periodic revision. In the present state of affairs in any case, we hold that

médico-légale de Paris on the Gallard proposal, A. H. P. (1876), and *Barbier*, an attorney in an analogous discussion before the same society, *id.* (1879).

all those should be confined who have been acquitted on grounds of insanity and the convicts who have become insane in prison as well as those who have become violent in ordinary insane asylums. The three divisions of the proposed Italian law are identical with those which have been established in England, where, however, among the prisoners who have become insane, only convicts are sent to Broadmoor, while the petty delinquents are sent to a private establishment for the criminal insane called "Fisherton House." Finally, as regards the criminal insane, we must state that the statistics of Broadmoor,[1] of the Penitentiary of Waldheim,[2] and other English statistics,[3] as well as those of Italy,[4] show an absolute agreement on two important facts:

A. The greater number of criminal insane among soldiers, either through the effect of military life (above all on neuropaths) or by the effect of the carelessness with which the army is recruited, or possibly by a union of both causes.

B. The greater number of insane criminals as the crime committed increases in gravity and danger. These facts appear to recommend most eloquently the establishment of asylums for the criminal insane.

§ 338. The Born-Criminal and Capital Punishment.

As to the class of born-criminals, since with them, as Maudsley says, we are confronted if not exactly with a degenerate type, at least with a degenerate variety of the human species, and the problem consists in diminishing the number as much as possible, a preliminary question must be disposed of first. Would it not be better once and for all to apply capital punishment to these

[1] *Orange*, "The Lunatic Criminals in England," J. M. S. (October, 1883). For a technical description, see *Selvatico*, "Il manicomio criminale di Broadmoor," R. S. F. (1898), XXIV, 506.

[2] R. C. (1883), fasc. 12, p. 574. Further data in *Sémal*, "Coup de'œil sur les folies pénitentiaires," an extract from "Du compte rendu du congrès de médecine mentale à Paris" (Medun, 1890).

[3] In 1873 the Commission of inquiry on the effect of the law of penal servitude found that three per cent. of male prisoners, and three and eight-tenths per cent. of female prisoners are lunatics, epileptics, and idiots. Assaults, incendiaries, and rapes are three times as numerous as with the sane. R. C. (1890), p. 464.

[4] *Algieri*, "Osservazioni statistico-cliniche sui criminali pazzi," A. P. (1894) XV, 408, found that forty per cent. of the insane delinquents examined in the asylum at Ambrogiana are murderers, twenty-one per cent. robbers, thirteen per cent. guilty of assault with deadly weapons, twelve per cent. brigands, guilty of assault with deadly weapons, twelve per cent. brigands, seven per cent. guilty of rape. Almost all, viz., sixty-eight per cent., were recidivists.

unfortunates when they commit grave crimes, since they are a continual danger for society either in themselves or by transmitting their anti-social instincts to their children? In other words, under this head the much agitated question of capital punishment arises in the most precise and peremptory manner. On it, for more than one hundred years, criminologists, philosophers, and the public at large have disputed, but unfortunately with a great amount of sentimental declamation pro and con, and with very little positive observation or calm reasoning. This question legally solved in Italy (which was the first among the larger countries to decree the abolition of capital punishment on the first day of January, 1890, having partially abolished it twenty-four years before, in 1876, but preserving it and applying it in the army) was advanced but not discussed at the First International Congress of Criminal Anthropology at Rome,[1] and we feel that it should be briefly dealt with here.

Capital punishment has its adversaries and its champions among classical and positive criminologists, but the diversity of opinion has a very different reason and scope in the two schools. For, while the classical abolitionists almost all believe in the more or less absolute illegitimacy of the pain of death, the positivists, on the contrary, are almost unanimous in believing that the death penalty is legitimate in principle, while some of them admit and others deny its practical advisability and utility. It is my belief that the death penalty is prescribed by Nature in every part of the Universe and in all phases of universal life. It does not seem to me to be in absolute contradiction with personal rights, because when the death of another is absolutely necessary, it is perfectly just, as a case of self-defense, whether individual or social. Among others, Carrara,[2] Beccaria,[3] and Romagnosi[4] hold this view. Furthermore, the universal law of evolution shows that the progress of every living species is due to a continual selection brought about by the death of those less fit for the struggle of existence, and this selection can, in humanity, and even, to a certain point, in animals, be effected artificially out of respect to the laws of life under the same conditions as it works naturally. It, therefore, conforms not only to the laws of justice, but to those of nature,

[1] A. C. A. C. (Rome, 1886), p. 336.
[2] *Carrara*, "Programma," § 661.
[3] *Beccaria*, "Dei delitti e delle pene," § 16.
[4] *Romagnosi*, "Memoria sulle pene capitali," § 3.

that society should effect an artificial selection within itself, destroying the elements harmful to its existence, — anti-social, non-assimilable, and deleterious human beings.[1] But, the weight of these conclusions must not be exaggerated, and they must be accepted, on the contrary, with those reservations which are always necessary in complex questions which cannot be determined by a monosyllabic answer. For we must note that this idea of artificial selection, although true, runs the danger, when transported without precaution into the sociological sphere, of entailing exorbitant results if an exclusive predominance is given to the race over the individual, or to material over moral interests. On the other hand, it must be tempered by the necessary balance between the rights of the individual and society or between moral and material interests which always must be considered; otherwise the Spartan practice of putting to death all individuals who did not conform to type, or who were affected with incurable and contagious diseases would be not only legitimate, but obligatory. Furthermore, it is one thing to recognize that capital punishment can, in certain cases, be legitimate as a supreme and necessary remedy under abnormal conditions and circumstances, and another, to declare that under normal conditions of social life it is useful and necessary.

It can be easily seen that society can, under normal conditions, provide in some other way than by execution for its own preservation by preventing the attack of anti-social elements or the perpetuation of their offspring, either through the isolation of the guilty for an indefinite period, or deportation, which are always within its power. Putting aside, for the moment, the problem of deportation, it is a fact that segregation for an indefinite period, surrounded by the proper guarantees, can form a true substitute for the other punishment. On the other hand, the utility

[1] *Lombroso*, "L'incremento del delitto," p. 79; "Misdea e la nuova scuola penale"; "Troppo presto" in "Appunti al nuova codice," 2d ed. (Turin, 1889), p. 22; *Garofalo*, "Criterio positivo di penalità," pp. 83 *et seq.*, "Criminalogia," in the "Biblioteca antropologica giuridica," 2d. ed. (Turin, 1891); "Contro la corrente" (Naples, 1888); *Carnevale*, "La questione della pena di morte nella filosofia guiridica" (Turin, 1888); *Rivarola*, "Crítica de la pena de muerte" (Buenos Ayres, 1888); *Tarde*, "Penal Philosophy," Chap. IX. For the opposite view, see, among the most recent writers, *Farese*, "Selezione e pena di morte," in the "Scuola positiva" (December, 1893); *Solovief*, "De la peine de mort," R. I. S. (March, 1898); *Peluso*, "Del fondamento positivo dato alla pena di morte della nuova scuola penale" (Naples, 1898); *Pulido*, "La pena capital en España" (Madrid, 1898).

and defensive efficacy of capital punishment is problematical, for when a man commits a crime he is either carried away by a sudden passion and thinks of nothing, or else he acts with premeditation, and what determines his course in the latter case is not a hypothetical comparison between the capital punishment and life imprisonment, but the hope of impunity. We should not be misled by the statement of some prisoner, condemned to death, who states that he is afraid to die; for, in the first place, that only means that he is so at the moment when he makes the statement and does not show that such fear would have been able to deter him from crime, because at the moment of its commission, through psychological impulsiveness, he was completely dominated by the criminal temptation. In the second place, if it is certain that every prisoner after his capture and sentence fears death more than life imprisonment (with the exception of those who commit suicide in prison, and those who cynically joke on the scaffold), it is no less certain, as Carrara remarks, that this result only applies to criminals who have been captured, which is not always done. Statistics show that the variation in the number of capital crimes is independent of the number of condemnations and executions, and that it depends on factors very different and more complex, as can be seen in Italy, where Tuscany supplies a number of capital crimes proportionately inferior to that of the other counties, which allow the death penalty. Again, we see in France, that in spite of the great increase in the total of criminality and the growth of population, whether through a spirit of contradiction or by contumacy, the number of murders, poisonings, parricides, and homicides has decreased from five hundred and sixty in 1826 to four hundred and twenty-three in 1881, although capital executions have diminished in the ratio of one hundred and ninety-seven to one. The same can be said of Belgium.[1] Consequently, it becomes very difficult to believe that experience shows the practical utility of capital punishment as an instrument for the protection of society.

In the last analysis, capital punishment, in its monosyllabic simplicity, is only an easy panacea, and under this head, it certainly does not solve a problem as complex as that of dangerous criminality. The destruction of incorrigibles is an idea which springs to life of itself, and Diderot, even in his day, championed

[1] *Francort*, "La peine de mort," B. U. S. D. P. (1898), VII, 36.

it as a consequence of the denial of free will, saying: "What is the mark of distinction between men — good or evil deeds? A malefactor is a man that must be destroyed — not punished." [1] But it is necessary to temper this opinion by a consideration of the material and moral conditions of social life and experience, which is our only teacher of the efficiency of different punishments. However, apart from these considerations, and without alluding to others which could be introduced here, because henceforth the question of capital punishment, hardly considered by juridical science, is, above all, the subject of a variety of personal sentiments, I hold only to the logic of facts; — either some utility is sought by the death penalty — for example, the unique efficiency which it presents as a means of artificial selection — and then it must be applied seriously and requires the courage of putting to death, in Italy, for example, more than fifteen hundred individuals annually,[2] or else, capital punishment remains written on the statute books without ever being applied, and then it should be abolished. Having said that the power of intimidation of penalties in general, without excepting capital punishment, is entirely insignificant as far as born-criminals are concerned, and is lessened still further by the fact that the people get accustomed to the idea of capital punishment, we can state briefly that ten or twelve executions a year will not cure criminality. Furthermore, these few and tardy executions embody all the disadvantages of the death penalty, and none of its advantages, by awakening, on one hand, a compassion on the part of the good citizen and a certain antipathy for the law, and, on the other hand, the ferocious instincts of the masses.

This is, above all, true when the executions are public.[3] Finally,

[1] *Diderot*, "Lettre à landois," cited by *Masi*, "Studi e ritratti" (Bologna, 1881), p. 214.

[2] The following annual average of condemnations pronounced by the Assizes from 1875–1881:

Homicide in commission of felony	635
Robbery, with assault	218
Simple homicide, not premeditated	1808
	2661

Subtracting the non-premeditated murders and crimes of passion, crime not due to congenital criminality, there still remains a figure in excess of 1500.

[3] Public executions are an outrage to the sentiment of humanity, which the legislature should never violate. It should, on the contrary, cultivate it with the greatest care by all direct and indirect means. I assured myself of the effect of witnessing an execution by attending one in Paris, in August, 1889, which I de-

Lombroso himself says that the infrequency of capital executions has deprived this form of punishment of all its efficiency, either as an example or as a means of selection. To be logical, we must, as I have just said, execute more than fifteen hundred a year. This is an easy enough statement, but, unfortunately, in the present state of public opinion, it is an absolute moral impossibility.[1] Capital punishment, as it exists to-day, is a mere scarecrow — and the criminals are like the birds — at first they believe it real, but soon they play in the shadow of the scaffold. How can malefactors be expected to fear a statute if they see, as a matter of fact, that the executioner never acts? This is the reason why Garofalo[2] and his followers are wrong in believing that the news of the legal abolition of capital punishment could have pernicious effects upon our imaginative and ignorant fellow-citizens, for it must be admitted that they pay less attention to legislative formulas than to their daily practical application; and even if this news did produce some disorder, it would soon cease, because social conditions would not have undergone such a change as would nourish and encourage it.[3]

scribed in "Delinquenti nell' arte." Aside from the question of right of capital punishment, I believe that not only is secret execution necessary, but also that less barbarous means than hanging or guillotining should be used. The important ends of capital punishment are the disappearance of the convict from the world and public notice of the fact. All ceremony and suffering are useless, and, therefore, unjustifiable. The death penalty should be inflicted, as Girardin, among others, proposed, by giving the convict an instantaneous poison and warning him that if justice be not accomplished by a certain time, he would be put to death by the executioner. The United States has adopted electrocution in place of this. See M. L. J. (New York, March, September, 1889; March, 1890), and the "Tribuna giudiziaria" (Naples, June, 1890); *Lacassagne*, "Les exécutions électriques aux États-Unis," in "Archives d'anthropologie criminelle" (June, 1892).

[1] What can be said of the scientific loyalty of certain adversaries? In one criticism of the first Italian edition of this book, made by the "Rivista penale" (May, 1881), p. cclxxx, I with silly statements, exclamation points, and lack of arguments, made the gentle reader t-r-r-r-emble, by letting him suppose that I, a new Torquemada, proposed the actual execution of two thousand delinquents per annum — while, on the contrary, I based an argument against capital punishment on the impossibility of such an holocaust.

[2] *Garofalo*, "Criterio positivo di penalità," p. 87.

[3] I wrote this in the third edition (1892) and this forecast has not been fully justified. In Italy, in spite of the legislative abolition of capital punishment, the annual average of prosecuted homicides, which was four hundred and sixty-nine in 1880–1886, four thousand and eighty-nine in 1887–1889, remains practically stationary after 1890, being three thousand nine hundred and ninety-three in 1890–1892, four thousand and thirteen in 1893–1895, and three thousand eight hundred and sixty-eight in 1896.

§ 339. Theory that no Punishment should be Permanent.

Capital punishment, therefore, being discredited as a means ordinarily unnecessary and inapplicable in such proportions as would render it efficacious against born and incorrigible criminals, an alternative remains between two eliminative means, deportation for life, or imprisonment for an indeterminate period in special establishments. There only remains this alternative, for we cannot guarantee either theoretical or practical importance to the opinion of certain German jurists (among whom we can name Holtzendorff [1] and Geyer [2]), which has been taken up in Italy by certain eclectics, that all life punishment should be done away with. For example: "If the punishment must extend throughout the entire life of man and end only with his existence, its result is to destroy the moral and juridical personality of the delinquent in one of the essential factors of human nature — the social nature (of a super-man), the development of which produces all juridical relations; and furthermore, this punishment is in opposition to the paternal functions of the State at the very instant when it by its legal exercise of them it declares that it recognizes them and prepares to exercise their necessary guarantees.

The temporary character of punishment is one of the conditions of its legitimacy in the sense that the individual liberty of the guilty must be limited in its exercise and not destroyed in its right, as would happen if one deprived the condemned (poor murderer!) of all hope of regaining its enjoyment (so useful to society)." This principle is, as can be seen, "a priori," without basis, and dangerous. It has no basis because it is impossible to speak of a social instinct in the most abnormal delinquents, those to whom life sentences would be restricted and whose instinct, for the very reason that it is anti-social, produces, if he is left at liberty, not legal, but criminal relations. But without taking this up, it is axiomatic that the State can attack or even destroy individual liberty when necessity demands. It is dangerous, because, on one hand, it leaves honest citizens defenseless against the most dangerous criminals, while, on the other hand, the concept of penalties, "brief but intense" (with which the Italian

[1] *Holtzeedorff*, "Mord und Todesstrafe," p. 225; "Die Kürzungsfähigheit der Freiheitsstrafen" (1861).

[2] *Geyer*, "Delle pene carcerarie," in the "Rivista penale" (September, 1877), p. 143. See also *Tallock*, "Penological and Preventive Principles," Chap. IV.

penal code is inspired), which forms the natural corollary of this "a priori" principle, represents a survival of torture. Furthermore, "brief but intense" punishment has this essential fault, that because of its brevity it is useless for social defense and because of its intensity, it is useless for individual reform.[1]

§ 340. Deportation for Life.

So, as has already been said, deportation or indeterminate perpetual imprisonment are necessary for the most dangerous and incorrigible delinquents who always return to some form of atavic criminality. Much has been written on deportation, in Italy especially, when, in the last few years, a lively polemic has taken place between Beltrani Scalia, who vigorously opposes it, and Cerruti, Carpi, and De Foresta, who uphold it with no less vigor. The host of criminalists are divided into two camps. Not being able to take it up from the beginning, I will here refer to the excellent works of Beltrani Scalia[2] and De Foresta.[3] The experience of the nations (especially England), which after adopting deportation to a great extent, have been forced to renounce it, is certainly a ground for consideration, yet only in so far as deportation such as has been practised up to the present day is concerned; that is to say, with criminal colonies. For, as Beltrani Scalia correctly says, it is better to construct them at home where they cost less and do better service. The French example is no more encouraging, at least in its practical applications. Yet deportation has one good ground for existence; when it is for life, and consequently with the least possible chance of repatriation, then it furnishes the best means of purging society of its dangerous members and frees it from its obligation to support them. But then it can only consist in simple deportation, that is, as it originally was in England, in the abandonment of the exiles on a desert island or continent with the necessary means to live there by

[1] A discussion, resulting in favor of the negative, took place on the increase of short-term sentences before the International Union of Penal Law at Antwerp (1894). See B. U. I. D. P. (1895), V, 85, 146, 177.

[2] *Beltrani Scalia*, "La deportazione" (Rome, 1874); "La riforma penitenziaria."

[3] *De Foresta*, "Le deportazione" (Rome, 1876); "Ne carcere ne patibolo," in the "Riv. carc." (1880), pp. 81 *et seq.*, and to the same effect in the "Comptes rendus du congrès pénitentiaire international de Stockholm" (1875). On his side, *Desprez*, "L'abolition de l'emprisonnement" (Paris, 1868), held that prisons must return to their old function of isolating the accused, while deportation and farming colonies would be reserved for the condemned.

work, or else by transporting them to barbarous countries where these men, who, half-civilized in civilized countries, represent a half-civilization. There, by the very organic and psychic qualities which made them robbers or murderers in a civilized society, they become temporary tribal chiefs or leaders in war among the savage populations who know no court to hinder their offenses.

But with the Italians, it is possible, and in fact, too easy, to practise deportation within the country itself by sending certain classes of delinquents to reclaim land, which malaria renders uninhabitable. If this disease demands human hecatombs before it can be conquered, it is much better to immolate criminals than honest farmers. Let us have a little less regard for criminals, and a little more for peasants and honest workers. Let the guilty become pioneers of civilization and regain by their death the esteem of humanity which they have so cruelly offended.[1] Up to the last few years trans-oceanic deportation was only a dream to the Italians because of the difficulty of finding suitable places, as is shown, for example, by the continual protestation of the Australian colonies against the deportation of French recidivists. Franklin's famous question is constantly repeated: "What would you say if we deported our rattlesnakes into England?" But since Italy possesses the colony of Erythea, the idea of deportation has gained ground. In May, 1890, I proposed in the Chamber of Deputies to experiment with a penal colony in African possessions. Prius, for his part, was absolutely opposed to the establishment of deportation for punishment in Belgium, after the establishment of the Congo Free State;[2] but I do not think that deportation can or should be its own end. The adult penal colony must be the advance guard of the free farm colony.[3] In any event, the admission of deportation for born and incorrigible criminals, either at home or abroad raises the problem of the form

[1] *Ferri*, "Lavoro e celle dei condamnati," and "Discorso al congresso penitenziario di Roma," A. C. A. C. (Rome, 1887), I, 422. This thought became law in the proposal Giolitti (5 December, 1902) passed by the Chamber of Deputies, 2 March, 1904. See *Franchi*, "Il progetto Giolitti per il lavoro dei condemnati all' aperto e il diritto penale." In Germany, the legal congress at Posen (February, 1898) unanimously (less five votes) resolved that "deportation is not a good means of repression and there is no use experimenting with this penalty." See also *Korn*, "Ist die Deportation unter den heutigen Verhältnissen als Strafmittel praktisch verwendbar?" (Berlin, 1899) (a subject submitted Holtsendorff-Stiftung), and on the subject *Mittermaier*, Z. G. S. (1898), XIX, 85.

[2] *Prins*, "Criminalité et répression," p. 196.

[3] *Ferri*, "Il progetto sui delinquenti recidivi," S. P. (March, 1899).

of isolation. A "House for Incorrigibles" should be instituted, where those guilty of crime serious enough to make them, through their determinative motives and circumstances, born-criminals and those who are guilty of a certain number of recidivic crimes, can be isolated from society, some for life, others for an indeterminate period extending until the proof is given that they are no longer dangerous, which amounts to the same thing, for we are dealing with hopeless cases.

The congenital nature and hereditary transmissibility of criminal tendencies fully justify the words of Quételet: "Moral maladies are like physical maladies, some contagious, epidemic, and hereditary. Vice is inherited in some families, like scrofula or consumption. The greater part of the ills which attack nations is due to certain families, which should be under special surveillance, similar to that to which suspected victims of contagious disease are subjected."[1] So Aristotle speaks of a man, who replied to an accusation of having struck his father, "My father struck my grandfather, my grandfather struck my great-grandfather, and you see my son, before he reaches man's estate, will have spared me neither violence nor blows."[2] And Plutarch adds, "The children of the vicious and the wicked take the nature of their parents."[3] Thus is explained the intuition of Plato who, while "admitting in principle that children should not be visited with the sins of their fathers, believed in the deportation of men as incorrigible, whose fathers and grandfathers have undergone capital punishment."[4] The thought, which Carrara qualifies as false, seems very just. Realizing, for example, that when Demetz founded the famous farming colony at Mettray, in 1839 (which was so bruited about for a time and then forgotten, as is usual), eight hundred and seventy-one children out of four thousand four hundred and fifty-four were children of convicts, the natural result was a belief that the State should not exile, but take care of these unfortunate

[1] *Quetelet*, "Du système social et des lois qui le régissent" (Brussels, 1878), Bk. II, § 11, Chap. III.

[2] *Aristotle*, Ethics, VII.

[3] *Plutarch*, "Opera," Chap. XIX. To the same effect, *Lucas*, "Traité physiologique et philosophique de l'hérédité morale" (Paris, 1897); *Morel*, "Traité des dégénérescences de l'espèce humaine" (Paris, 1857); *Despine*, "Psychologie naturelle"; *Lombroso*, "L'uomo delinquente," 2d and 3d editions; *Thomson*, "The Hereditary Nature of Crime," in the "Journal of Mental Sciences" (1870); *Ribot*, "L'hérédité psychologique," 3d edition.

[4] *Carrara*, "Programma," § 647 note.

families, and, following Crofton's proposition, put the children of convicts in houses of reformation and industrial schools.[1]

§ 341. Indeterminate Segregation.

In Italy, Lombroso, Curcio, Barini, Doria, Tamassi, and Garofalo;[2] in France, Despine, Labatiste, Tissot, Minzloff, Leveille;[3] in England, May;[4] in Germany, Kraepelin and Lillenthal,[5] in Austria, Wahlberg;[6] in Switzerland, Guillaume;[7] in America, Wines and Wayland;[8] in Holland, Van Hamel,[9] and in Portugal, Lucas,[10] among many others, all agree on the proposition of permanent or indeterminate isolation for adult recidivists. But, I believe that the number of relapses, necessary to establish incorrigibility must vary with the malefactor and the crime. For example, murderers and homicidal robbers can be imprisoned for life for one crime, if the expert recognizes them as born-criminals. For lesser crimes, three or four repetitions may be necessary to establish incorrigibility. Such ideas are not far from practical application; above all, in the countries where, classical criminal theories having less authority, practical propositions meet less opposition at the hands of metaphysical prejudice. Thus in

[1] R. C., I, 89. See also *Garnier*, "Le criminel instinctif et les droits de la défense sociale," A. H. P. (1890), XXIII, 5.

[2] *Lombroso*, "L'uomo delinquente," 2d ed., p. 437; *Barini* against Chimera, "Penitenziario per gli incorreggibili," in the R. C. (1875), p. 454; *Doria*, "Penitenziario per gli incorrigibili," R. C. (1875), p. 523; *Tamassia*, R. F., III, p. 683; *Garofalo*, "Criterio positivo di penalità," "Criminalogia"; *Garofalo* and *Carelli*, "Dei recidivi e della recidiva," in the "Trattato di diritto penale pubblico dal Cogliolo" (Milan, 1891).

[3] *Despine*, "Psychologie naturelle," III, 500; *Labatista*, "Essais sur les institutions pénales des Romains" (Paris, 1875); *Tissot*, "Introduction philosophique à l'étude du droit pénal," IV, Chap. IV, § 4; "Le droit pénal," I, 477; *Minzloff*, "Études sur la criminalité," in the "Philosophie positive" (September, December, 1881); *Seveille*, B. U. I. D. P. (1893), p. 83.

[4] *May*, "The Treatment of Habitual Criminals" (London, 1880).

[5] *Kraepelin*, "La colpa e la pena," p. 48; *Lillienthal*, B. U. I. D. P. (1890), p. 64.

[6] *Wahlberg*, in the "Comptes rendus du congrès pénitentiaire international de Stockholm" (1879).

[7] *Guillaume*, C. R. (1879), I, 456.

[8] *Wines*, C. R. (1879), I, 450, and *M. B.*, "La réforme pénitentiaire aux États-Unis," in the "Actes du congrès pénitentiaire international de Rome" (1887), II, p. 727; *Wayland*, "Incorrigible Delinquents," summarized in R. C. (1888), p. 558.

[9] *Van Hamel*, "Rapport sur les moyens pour combattre la récidive," B. U. I. D. P. (1889), p. 92.

[10] *Lucas*, "Rapport," B. U. I. D. P. (1889), p. 104.

France, after the pamphlets of Petit [1] and Migneret [2] and especially after the propaganda of Reinach,[3] followed as it was by many similar publications [4] and preceded by Michaux,[5] the law of 1838 was promulgated, which provides for the deportation for life of delinquents guilty of a certain number of repeated crimes.[6] Murray Brown and Baker outlined before the Congress of Stockholm and developed before the Prison Society,[7] the system of "cumulative

[1] *Petit*, "Rapport sur la répression de la récidive," B. S. G. P. (February, March, 1878).

[2] *Migneret*, "La surveillance légale en France," in the "Revue critique de législation."

[3] *Reinach*, "Les récidivistes" (Paris, 1882).

[4] *Nivelle*, "De la récidivité au point de vue pénitentiaire" (Paris, 1882); *Desportes*, "La récidivité" (Paris, 1883), with a full bibliography; *Bérenger*, "Proposition de la loi relative aux moyens préventifs de combattre la récidive," B. S. G. P. (April, 1884). For the Italian project on delinquent recidivists, see *Ferri*, speech in the Italian Parliament, S. P. (March, 1899). See also *Griffith*, "Sur le traitement pratique de la récidive," A. C. A. C. (Geneva, 1897), p. 34; *Manzini*, "La recidiva nella sociologia, nella legislazione e nella scienza penale" (Florence, 1899).

[5] *Michaux*, "Étude sur la question des peines" (Paris, 1875), with full historical notes on English deportation.

[6] For discussion in Italian Parliament, see R. C. (1883), pp. 343, 393. For applications of this law, which are not satisfactory and which cannot be ameliorated by a change of officials, because the vice is in the institution itself, see *Bérard*, "Résultats de la loi du 27 Mai 1885 sur la relégation des récidivistes," A. A. C. (January, 1890, May, 1897); *Jacquin*, B. S. G. P. (Paris, 1890), p. 785; *Dislère*, "Rapports annuels sur l'application de la loi pour la relégation des récidivistes"; *Moncelon*, "Le bagne et la colonisation pénale à la Nouvelle-Calédonie" (Paris, 1886); *Nicomède*, "La relégation collective à l'île des Pins en 1887–1889" (Rochefort, 1889); *Nattan*, "La transportation à la Nouvelle-Calédonie," in the "Revue d'évolution" (Paris, May, 1891); *Garraud*, "Traité de droit pénal français" (Paris, 1888), I, 473, II, 335; *Legrand*, "La Nouvelle-Calédonie," A. A. C. (January, 1883); *Cor*, "De la transportation" (Paris, 1895); *Mimande*, "Forçats et proscrits" (Paris, 1897) and "Criminopolis" (Paris, 1897); *Blanchet*, "Transportation et colonisation pénale à la Nouvelle-Calédonie," in the "Revue pénitentiaire et parlementaire" (10 January, 1898). See also the discussions before the Société des prisons de Paris, report in the "Revue pénitentiaire" (April, 1897, April, 1889). The Chairman of the Commission of the French Chamber of Deputies, Haussmann, fully reviewed the project in 1891, showing the inconvenience of deportation to New Caledonia. Each deportation costs one hundred and fifteen dollars for travelling expenses, and thirty-five dollars per diem for support in the colony. The number of exiles is twelve hundred per annum. The expenses of the officers, the salary of laborers, of one dollar a day, rations, deportation of the families of the prisoners, and concessions to freed convicts who settle in the colony, must be added.

[7] *Murray Brown*, "La récidive en Angleterre," S. S. G. P. (April, 1878); *Baker*, "La lutte contre le crime," *id.* (May, 1878); "Le système cumulatif," *id.* (July, 1878); "The Cumulative System, The War with Crime" (London, 1889), pp. 24 *et seq.* France has established, together with conditional punishment, the progressive increase of punishment for recidivity, by the law of 27 March, 1891. See *Béranger*, "Rapport sur la proposition d'aggravation progressive des peines

and progressive sentences" adopted (although not generally) in England in cases of obstinate recidivity, increasing the term of imprisonment for each offense with geometric precision. This system, sketched by Field and Walton Pearson at the meeting of the English Society for the Advancement of the Social Sciences,[1] and later by Cox and Call [2] at the meeting of 1874,[3] was already, according to Monat, adopted by the Indian Code. It has since been applied in Japan, by a decree which inflicts life imprisonment for the fourth repetition of a crime.[4] The Canadian representative at the Congress of Stockholm presented a report in which he said, "The number of crimes is increased by the repetition of sentences of short duration. After their first sentence, a great many prisoners of this kind become professional delinquents (true delinquents by acquired habit). Professional robbers, habitual delinquents, except in exceptional cases, must be condemned for life or for a term equal to that which they will live." [5] The proposed Russian penal code,[6] the proposal before the Swiss legislature, and the proposed Italian penal code, show that a new light is dawning at last in the sphere of criminal legislation, another indication of the approaching positivist triumph. Senator Bérenger complimented this school by presenting a law providing for increased punishment in cases of recidivity. This has, together with conditional punishment, become the law of France.[7]

It is probable, therefore, that the classical jurists themselves will end in adopting indeterminate seclusion for incorrigibles, as they must sooner or later advocate asylums for the criminal insane, two innovations equally contrary to the purity of their juridical principles. At the Penitentiary Congress at St. Petersburg, this double question was presented for the first time: "Can it be admitted that certain delinquents must be considered as incorrigible; if so, what means can be used to protect society against them?" And Spazowitch, in his report before the law society

en cas de récidive et de leur atténuation en cas de premier délit," B. S. G. P. (Paris, 1890); *Parmentier*, "La loi sur l'atténuation et l'aggravation des peines," *id.* (April, 1891), p. 436; *Capitant*, "La loi du 27 Mars 1891," in the "Revue critique de législation" (June, 1891).

[1] October, 1871. [2] Chief of Police of Glasgow.

[3] R. C. (1871), p. 514. [4] R. C. (1873), p. 428. [5] C. R., I, 450.

[6] Russian Penal Code. Proposal of the commission for amendment (St. Petersburg, 1883), p. 22, Art. 56.

[7] *Béranger*, "Proposition de loi sur l'aggravation progressive des peines en cas de récidive et de leur atténuation en cas de premier délit," in the "Bulletin de la Société générale des prisons" (May, 1884).

of St. Petersburg, recognized that "this question shows the mark of its origin. Of all the questions on the program, it alone appears inspired by the principles of the new positivist school of criminal anthropology, whose theories, spreading far from Italy, their native land, tend to reform radically both science and legislation, penal law and porcedure, the concept of crime and the means of its suppression." And the Congress approved of special measures against recidivists.[1] The "Union internationale du droit pénal" followed its example in 1890, at Berne.[2]

§ 342. The Cellular System.

We have now reached the fundamental problem of the practical organization of the indeterminate segregation of born-criminal and incorrigible recidivists. As Tarde said, "Two great penal inventions have arisen, or rather have been developed, within the last hundred years. They are objects of competition among the various countries; penal colonization, of which deportation is only an important form, and the cell."[3] The latter has greatly predominated since it has been reintroduced from America into Europe, where the cellular prison of San Michele at Rome and the prison at Ghent were its forerunners. The cellular system, born of the reaction against the frightful physical and moral putrefaction of the convicts in the promiscuity of the prisons and galleys, still has many champions. This is partially due to the spirit of pietism and religious penitence, which always accompanies it. But, the system cannot stand objective criticism. And, indeed, a reaction against it has already begun among the penitentiarists. At the beginning, absolute and continuous isolation day and night, "solitary confinement," was advocated. Soon, however, it was seen that this did not tend to the reform of the guilty, and the severity was tempered by visits from the chaplin, warden, and inspectors. This is "separate confinement."

[1] "Resoconto del congresso penitenziario de Pietroburgo," in R. C. (July, 1890); *Joly*, "Le 4e congrès pénitentiaire international," in the "Archives d'anthropologie criminelle" (September, 1890). See also the reports of *Crocknay*, *Sparowich*, *Arenal*, *Alonghi*, *Anmutzboll*, *Gramantieri*, *Wahovitch*, *Dubois*, *Latischeff*, and *Sichort*.

[2] B. U. I. D. P. (Berlin, 1891), pp. 210, 232; (1892), p. 234. See also *Thiry*, *Alimena*, *Van Hamel*, *Mans*, and *Morel*, "Des mesures applicables aux incorrigibles," A. C. A. C. (Brussels, 1893), pp. 56, 394, 432; *Lombroso*, "Le traitement du criminel né et du criminaloïde," *id.* (Geneva, 1897), pp. 143 and 320; "L'uomo delinquente," 5th ed., Vol. III; *Bessière*, "La loi pénale et les délinquents incorrigibles" (Paris, 1899). [3] *Tarde*, "Penal Philosophy" (Boston, 1912).

Later, it was found that it was important to have isolation only during the night. At the Auburn prison, the system was adopted, to which it has given its name; solitary confinement during the night and labor in common during the day, with the constant requirement of silence. But, then, when in spite of the triple panacea of isolation, work, and education (above all, religious), the number of recidivists increases, it does not seem reasonable to subject a man for months and years to a monastic life (like that of a Trappist) in a monstrous human hive (which Bentham advocated before l'Assemblée constituante française under the name of "panoptic") and to expose him at the expiration of his term, from the moment that he crosses the prison doorsill, to all the temptations of an environment to which his lungs are unaccustomed. Thus, the progressive system was invented, first in England on the initiative of Henderson and Du Cane, then in Ireland, under the name of the Irish gradual system, or the system of Colonal Crofton. It would be difficult to imagine anything more symmetrically perfect or more in conformity with the Heckelian law that "ontology sums up philogeny," for it resumes all precedent systems making each a phase of the gradual system. It begins with a philadelphian period of absolute isolation "so that the convict may commune with his conscience," or "so that he may obtain an intense impression of forethought and fear." Then comes an Auburn term of isolation by night and common work by day (when they make him work) with the famous obligation of silence. After that period, comes an intermediate term in a farming colony, with daily work without the establishment, as a convalescing period, during which the lungs get reaccustomed to free air. This is the addition made by Crofton to the English system. This is followed by a period of conditional liberation ("ticket of leave"), in which the prisoner is freed from the last part of his sentence, if during the period or time immediately succeeding it, he commits no new crime. The progressive or regressive passage from one period to another is automatically regulated by the number of marks gained or lost by good or bad conduct. But only a purely negative value can be assigned to such surveillance. The Irish or gradual system is well on the way to be paramount throughout Europe.

Even Belgium, which until the present has been most faithful to the pure cellular system, drew away from its purism under the influence of daily experience and was the first continental country

to introduce (in 1888) conditional punishment, the natural result of the abuse of short-term sentences. It cannot be denied that the Irish system is better, or less bad, than the others, but it must not be forgotten, however, that a great many of the quasi-miraculous effects of reform and diminution of recidivity and crime (effects which are celebrated in the name of each new system, and which sooner or later are found wanting) were due in Ireland to the large American emigration of convicts conditionally liberated. This emigration reached a proportion of forty-six per cent. Nor must it be forgotten that this system, requiring as it does more than any other system, a capable personnel, is less difficult of application in a country like Ireland with but a few hundred prisoners than in Italy,[1] with its terrible "stock of malefactors," as Rienzi said, amounting to many tens of thousands. But what we deny and what we admit only as accessory (even for the detention of the accused after the Grand Jury has returned a true bill) is the right to exist of the cellular system, which reaches the heighth of absurdity and inhumanity in life sentences. As I said in 1886, I will always repeat: the cellular system is one of the aberrations of the nineteenth century. A cellular prison is inhuman, because it eliminates or destroys the social instinct, already largely atrophied in criminals, and because it results in insanity or consumption (through onanism, lack of exercise, and bad air), and because it induces penitentiarists, in order to avoid these faults, to construct comfortable cells for murderers, which is an unpardonable and revolting insult to the hovels of the honest poor. Psychiatry has even registered a special form of alienation, called "prison mania," and medicine recognizes "prison consumption" as a disease.

The cellular system cannot be effective in the reform of amenable prisoners (in cases of term imprisonment) because it enfeebles, in place of strengthening the social and moral sense of the prisoners, and also because, unless the social environment is bettered, it is useless to bestow care upon a prisoner, who, upon his release, will find the same conditions which led him to crime uneffaced by an efficient social foresight. The cellular system is inefficacious also, because the moral isolation, which is its object, is unobtainable. The prisoners find a

[1] The Italian law of 2 March, 1904, providing for the labor of convicts in wild and swampy land, with an express and definite renunciation of the Irish system, has borne out this which I wrote in my third edition in 1892.

thousand means of communication, either in the hour of exercise, by writing in the books given them to read, or on the soil of the courts in which they walk, or by striking on the wall according to a conventional alphabet. Lombroso, in "I palimsesti del carcere," gives clear proofs of this. Scientists and the world at large believe in good faith that a prison, especially if cellular, is a mute and paralytic organism, lacking tongue and hands, because the law here decreed that it should be silent and still. But no decree, however forcefully sustained, can prevail against the nature of things: this organism speaks and is silent, and sometimes strikes and kills despite all the decrees. But, as always happens when a necessity of our nature conflicts with law, it is manifested in the most unexpected, hidden, and unforeseen ways.[1] Lastly, the cellular system is too expensive to be practical. Thus, notwithstanding that the legislatures of England, France, and Italy have enacted it in codes or special laws for all imprisonments, it fortunately has been impossible to give it complete application because of the enormous expense which it entails. It has even been entirely abandoned in Italy by the law of 2 March, 1904. For it has been seen that it is too great a burden on the honest, either by the taxes required or by the moral and material competition, which will not be very extensive, seeing the number of laborers imprisoned, but which is very intense in the locality of the prison, permitting industrial labor, while in spite of both taxes and competition, the State does not cover expenses, because cellular isolation is clearly not suited to an advantageous organization of labor.[2]

§ 343. Outdoor Work in Farming Colonies.

Isolation by night is sufficient, and this reduces the expense. Outdoor labor is the only useful isolation for the convicts, since man is what he eats and breathes. Air, light, exercise, labor in the fields, can of themselves, in a country like Italy with a southern race and a large proportion of peasants, regenerate the less degenerate animals, hinder in all cases consumption and the brutalization of the incorrigible, while at the same time, it gives them a remunerative form of work. Farming colonies, in lands to be

[1] *Lombroso*, "I palimsesti del carcere," Preface.

[2] *Ferri*, "Lavoro e celle dei condamnati"; "Studi sulla criminalità ed altri saggi"; *Prius*, "Criminalité et répression"; *Lombroso*, "Illusioni dei giuristi sulle carceri," A. P. (1886), p. 563. See to the same effect, *Browne*, "Commonsense and Crime," in the "Fortnightly Review" (August, 1895).

reclaimed, for adults, choosing healthy or unhealthy situations according to the category of the delinquent (born, habitual, occasional) and the gravity of the crime; in cultivated lands for minors, under the form of farming houses of correction show the ideal, the typical form of isolation of convicts.[1] Wherever, there are men gathered together, there will be human fermentation and putrefaction. Work in the open air is the only method in accordance with the demands of physical and moral hygiene. And if, for the convicts who have spent their lives in the city, work in the field is not possible, there is nothing to prevent (and it would be an excellent measure) the annexation to every farming colony, in order to make it self-sufficient, of industrial shops, where each prisoner could follow his trade. As far as the city prisoners without any trade or professions are concerned, in spite of the neurasthenia which renders them incapable of serious and methodical work, farming colonies furnishing them labor which is not too severe is the best institution. This is proved, apart from the organization of prisons, by the example of the farming colonies founded in Holland, Belgium, Poland, and Austria for healthy mendicants and vagabonds. The same evolution takes place in the segregation of criminals as in that of the insane. First, both have the same horribly corrupt life in common in hospital or gaol. Then, life in some barracks in the form of asylum or prison; then the village system or Scotch open-door system for the insane, and lastly, the free colony, such as exists at Ghent, in Belgium, for harmless insane who farm and do a little industrial labor.[2] The same result will be attained for delinquents, and the barracks will be superseded by the outdoor life of farming colonies, a much better method of social isolation for an indeterminate period.

[1] This conclusion has been reached by *Joly*, "Combat contre le crime" (Paris, 1893), Chap. XIV; *Ferrero*, "La lotta contro il furto," in "Archiv. di psic.," XVI, 482; *Griffiths*, "Penal Colonies," in the "North American Review" (December, 1896); *Eula*, "Dal carcere alla colonia agricola" (Milan, 1898). *Luchini* himself comes to this conclusion, notwithstanding his bitter attacks upon positivism in the "Rivista penale." His article on prison outdoor labor.

[2] *Marandon de Montiel*, "L'hospitalisation de la folie et les nouveaux asiles ouverts pour les aliénés," in the "Annales" (November, 1875, November, 1896, August, 1897); *Toulouse*, "L'open-door en Écosse," in the "Revue de pyschiatrie" (September, 1900). Farming colonies have been demanded even for epileptics by *Peterson*, "American Journal of Nervous and Mental Disease" (December, 1889). Such colonies have already been established at Laforce in France, and in the United States by Oscar Craig. See A. M. P. (August, 1894), p. 170.

§ 344. Classification of Habitual Criminals.

The anthropological character of habitual criminals is sufficient to warn us that the two phases of this criminal activity and the means suited to its repression must be distinguished. In other words, the moment when they commit their first crime must be distinguished from the period when they have become habitual and even incorrigible. It is evident that in the first of the two phases they must be considered as occasional delinquents, while in the second, they must be treated with the same measures as born-criminals. The difference is that the delinquents by acquired habit generally commit less serious offenses than born-criminals. In establishments for incorrigibles the discipline and term should be made to fit the class. Above all, while one grave crime is sufficient to remove a born-criminal from society, a greater or less number of relapses, according to the kind of crime and surrounding circumstances, are necessary before an habitual criminals can be ranked among the incorrigibles.

§ 345. Occasional Criminals and the Abuse of Short-Term Sentences.

As far as occasional criminals are concerned, measures for social protection should be preventative rather than repressive. That is to say, care should be taken that no error should put this occasional criminal into recidivity and incorrigibility. In this class, particularly, a distinction must be made between minors and adults. For the former, more than for the latter, the preventative quality of social sanction can produce sensible effects on the diminution of criminality, provided that physio-psychical study and cure of the criminal minor or candidate for crime supercedes the complicated graduations of responsibility, which, in the case of minors, so embarrass the codes and make the precocity of the delinquent an abstract reason for relative or absolute irresponsibility,[1] in place of considering it as a dangerous symptom of congenital degeneracy.[2] Beginning with moral and physical care of abandoned infancy, which is one of the most efficacious substitutes for punishment, and then proceeding to obligatory

[1] This logical conclusion is reached by *Bozi*, "Bekämpfung von Gewohnheitsverbrechen" (Berlin, 1895), that "habit which weakens the will, must lessen the responsibility of the habitual criminal."

[2] For an example of the fetishism of punishment, see *Joly*, "Des délits commis à l'âge scolaire," in the "Revue pénitentiaire" (1894), p. 885, where he proposes a school jurisdiction to punish scholars who commit a first offense.

correction and actual punishment for young criminals, we find a whole system to be radically reformed, and one from which imprisonment must be excluded. It can only be a question of isolating minor delinquents (or at least the less abnormal) in honest families, and, above all, placing them in farming colonies where they would naturally be subjected to a discipline different from that of the adult penal farming colonies, but where isolation by night and daily work in the open air would be obligatory. They would be placed there for indeterminate periods. Large establishments should be avoided.[1] In regard to adult occasional delinquents, it would be superfluous to insist upon the absurdity and danger of short-term sentences, with or without cellular isolation, although this is almost the exclusive form of detention to-day. A few days in gaol — generally spent in the company of habitual delinquents — can have no intimidatory effect, especially with a ridiculous minimum of one or two days, such as is allowed by the Dutch and Italian codes. They have, on the contrary, disastrous effects, depriving justice of any serious quality, destroying all fear of punishment, and forcing first offenders into recidivity by the dishonor with which they are tainted and by the corrupting contact with habitual criminals, the effect of the gaol. The effects are so undeniable that the plebiscite and crusade against short-term sentences can be said to be unanimous. And yet the wisdom of the Italian law-makers, in the amending of the code, has taken no account of the fact that several years experience on the part of all nations had proved how absurd and dangerous such punishments are.

§ 346. Substitutes for Short-Term Sentences.

This brings us to the problem of the substitution of other repressive means for the immense number of imprisonments inflicted for slight crimes. Students and legislators have tried hard to find them; detention at home, bond, judicial admonition, forced labor without imprisonment, conditional suspension of sentence and punishment, local exile. Among all these substitutes there is one which is enthusiastically received to-day, "conditional sentence," or the suspension of sentence.[2] I do not

[1] I defended these ideas before the "Société des prisons de Paris," at the session to which I was invited. See "Revue pénitentiaire" (February, 1900), and S. P. (January, 1900).

[2] See among others, *Borillaire*, "Peines qui pourraient, dans certains cas,

believe that any of these substitutive measures can be really efficacious or as generally applicable as required by the innumerable classes of the delinquent authors of petty crime. Recognizance or guarantee "de bene vivendo" is too unequal for the poor and rich. It is too rarely applicable to most convicts in practice to be anything but an exceptional and accessory measure in addition to reparation in damages. It has disadvantages even when in the form of a bond by a third party. Judicial admonition (with or without bond), which the new Italian penal code[1] would revive despite the experience under old statutes and despite the audacious innovation of calling it "judicial reprimand" in place of admonition (to distinguish it from the objectionable and useless police admonition), cannot be seriously considered. Either the condemned is in fact an occasional delinquent, sensible to the call of honor, then criminal sentence would give him a lesson without need for the judge to read him a homily or a sermon; or else moral sensibility is lacking in the condemned, and then this reprimand is lost and can have no effect on the prisoner or the public. This is so patently true that it has fallen into disuse. Forced labor without imprisonment can be admitted, not as a penalty "per se," but as a means of obtaining the full reparation in damages, which is the only sanction to be applied to occasional delinquents, guilty of petty crimes. Local exile (or banishment from the scene of past crime) can be added as a measure of prevention and as a satisfaction to the victims in many cases where the punishment consists in reparation in damages.[2]

§ 347. Substitutes for Short-Term Sentences: Conditional Sentence.

To-day the conditional sentence has a literature of its own. Its provisions may be briefly outlined. In cases of petty crime, if the defendant is not a recidivist and appears to deserve the benefit of this law, the judge can suspend sentence or its execution for a definite period; and if this time elapses without the delinquent being guilty of bad conduct or committing a new crime, the

être substituées à l'emprisonnement," in the "Revue pénitentiaire" (June, 1893 *et seq.*).

[1] Articles 26, 27.

[2] For the complete failure of the equivalents of punishment in the new Italian code, see *Costa*, in the "Atti di commissione statistica giudiziaria" (Rome, 1895), pp. 436 *et seq.* See also *Rispoli*, "Funzione dei surrogati e instituti affini" in the "Rivista penale" (October, 1897).

judgment is discharged; in the contrary event, the sentence is executed or the penalty exacted, together with that of the second crime. This conditional suspension has developed in two main forms, widely different. In Boston, from 1870 for minors, and from 1878 for adults, and from 1880 throughout Massachusetts, judgment is suspended even without regard to the nature of the crime and the history of the delinquent; the judge merely fixes the probation period from two to twelve months. There is a probation officer, whose duty it is to watch those freed on probation, with extensive powers, including that of bringing them before the Court, for bad conduct, and demanding sentence, without there having been any recidivity in a true sense. This system has been introduced into New Zealand and Australia by the Act of 6 October, 1886, with the following preamble: "There are reasons to believe that certain delinquents would be able to reform if, in place of imprisoning them after the perpetration of the first crime, they were given means of better behaviour." In England the Act of 8 August, 1887, "the probation of first offenders" united the probation system with that of bonding to keep the peace. The verdict is recorded but no sentence pronounced. The benefit of the suspension of sentence is refused to every recidivist and to every one guilty of a crime punishable by an imprisonment of more than two years. There is no probation officer because of the recognizance or bond.[1] On the Continent, a different form has been adopted; there is no surveillance exercised by a special officer and no guarantee of good conduct — judgment is given and even the sentence is pronounced, and the benefit of the suspension is not lost by bad conduct but only by actual recidivity. Such (apart from divers conditions on the limit of punishment, permitting a conditional sentence on the term given for relapse, and on other details) is the system proposed first in France in 1884, by Berenger, but first applied in Belgium by the Act of 31 May, 1888, "On conditional liberation and conditional sentences,"[2] later in France by the Act of 26 May, 1891, "On the decrease and increase of punishment," in

[1] The investigation of the Howard Association resulted in the institution of probation officers in England.

[2] *Le Jeune* in Belgium proposed conditional sentence even for military offenses, "Revue pénitentiaire" (1896), p. 172, and as long as standing armies continue to exist, I think it would be most useful in that sphere, both because the offense is generally a breach of discipline, and because of the personal knowledge of the offenders.

Portugal by the Act of 6 July, 1893, on conditional liberation and sentence, and subsequently in Luxembourg, Geneva, and Norway. In the Penitentiary Congress at London (1872) and at Rome (1885) there was a discussion, followed by no resolution, as to whether it would be wise to substitute for gaol sentence for petty crimes, either simple detention without labor,[1] obligatory labor without imprisonment, local exile, or judicial admonition.[2] It was the "Union internationale du droit pénal," which, next to the "Howard Association," in 1881, made the greatest demand for conditional sentence. It insisted, however, in accordance with the observations of Garofalo, "on the necessity of determining the limits according to the local conditions and the sentiment and moral state of different peoples." Thus, at St. Petersburg in 1890, the Penitentiary Congress discussed the replacing of short-term sentences by judicial admonitions or conditional sentences, but no resolution was reached and the question was referred to the next meeting in Paris in 1895.

There have also been many proposals for conditional sentences in Italy, Austria, and Germany, while Prussia, Saxony, and Bavaria have already applied it administratively. The data furnished by these applications, cannot, because of the short duration of the experiment so far, lead to instructive conclusions. As to Boston, where the statistics run from 1879, because conditional sentence was largely applied to drunkards, who are not true delinquents, the figures for recidivists for the year 1889 of sixty-four in eleven hundred and twenty-five, or six per cent., deserve no confidence.[3] Every time that a new prison system or a new combination of systems has been tried, more or less marvellous returns have been shown, but soon, by a kind of fatality, they have diminished until different conclusions are reached and the need of a new combination shown. This is and always will be that the legislative judges and guardians are equally ignorant of criminal man, and that the actions of the latter are completely foreign to the former. Hence the more or less superfluous character of the measures taken,

[1] A. C. A. C. (London), p. 408. [2] A. C. A. C. (Rome), I, 179, 258, 660.

[3] "Probation work in the County of Suffolk for the year ending 31st December, 1889" (Boston, 1889). The same can be said of France, see "Journal de la Société de statistique" (February, 1875). In 1893 twenty thousand four hundred and four out of one hundred and sixty thousand and fifteen, or twelve per cent. of the sentences, were conditional. In England, in 1896, eight thousand eight hundred and seventy-three out of thirty-nine thousand seven hundred and thirty-seven sentences were conditional. *Bodio*, R. C. (August, 1898).

always with regard to the crime and not the criminal, and, therefore, always without touching the roots of criminality. Hence, too, the inevitable disillusion brought by reality after its first trial. Far from admitting the principal objections of Kirchenheim and Wach, I do not agree with them that the conditional sentence violates the principle of absolute justice, which requires every crime to entail the same penalty, or that the alleged failure of short-term sentences is no reason for abolishing them, but only for applying them more accurately and efficiently.

The first objection has no influence over a follower of the method and principle of the positive school, and it is useless, as Gautier said, to discuss the consequences when the premises are as opposed as these are to the principles of distributive justice and social reparation. All that this objection proves is that conditional condemnation is a forced concession by classical doctrinism to heterodox positivism. The second seems no better founded, for the failure of short-time sentences is organic, and therefore inevitable. There is no question of their more or less effective practical execution; such changes could have only a very secondary influence. It is the short-term sentence itself which is a failure and useless. Putting aside, however, the other objections as to detail which are advanced against the form given to the conditional sentence on the continent of Europe in comparison with the American system (which is certainly preferable because it does not abandon the condemned and is not restricted to legal recidivity), I am not an enthusiastic champion of it, at least while penal justice follows present reform methods in a more or less superficial manner.

It cannot be sustained, in spite of its very favorable first impression, and this is true for reasons different from those which have been advanced until the present time by its adversaries. In the first edition of this book it was held that repression should be mild for occasional delinquents and expressly severe for recidivists, approaching segregation for a determinate period. The popular Italian proverb, "For the first offense a pardon; for the second a whip," is only an unconscious confirmation of this observation. This is why at the first glance conditional sentence, particularly if there is added to it, as under the French law, successive increase of punishment for recidivists, presents a seductive aspect. But if studied with attention, it has two organic faults which are inherent in the

present penal system and which the champions of conditional sentences, being generally undecided between the classical and the positivist theories, naturally do not correct. The first is, that the classical school, considering the crime and the positive school demanding that the delinquent be considered, especially in regard to the anthropological category to which he belongs, leaves the champions of this kind of punishment (in its present form) between the two schools regarding the delinquent more than the crime, but making him an abstract and mean type, and not a living, palpitating human being such as he is in a different anthropological category. To prove this it is only necessary to recall that Article IX of the Belgian Law governs conditional punishment according to the nature of the penalty, allowing it, if the latter does not exceed six months, even when it is the accumulation of several penalties. This means that conditional punishment is allowed in the case of many crimes whose author is in fact a recidivist and not, save in very rare cases, a true occasional delinquent. The two fundamental conditions for conditional sentence in Europe (a petty crime and a non-recidivistic delinquent) are not an absolute guarantee of its correct application, although the personal character of the delinquent is indirectly before the judge in order that he may determine according to circumstances independent of legal conditions, whether it is well or not to give a conditional character to his sentence. We know besides this that the packing of courts of correction and police stations with accused men is a sorrowful answer to the filling of prisons with guilty men condemned to short-term sentences.

The inevitable result will be that judges, if only controlled by this numerical reason, will end by forming a habit of almost mechanically giving a conditional sentence, as they have been led already to allow extenuating circumstances to influence their sentence when they were introduced in France in 1832 in order to permit an individualization of punishment, that is to say, to recall to the judge the fact that he should suit the sentence to the delinquent and not to the crime. Until penal procedure is radically reformed in the manner in which positivism demands it, so that the collection, discussion, and analysis of the evidence (the only elements from which a penal judgment should be formed) serve only to determine the anthropological category, that is the physio-psychical qualities of the delinquent, it will be humanly impossible for the practical applications of judicial machinery to succeed

while it mechanically and impersonally applies punishment to crime and not to men. It is so patent that it is already recognized in Belgium, for example, that a conditional sentence, influenced by the habits of thought of the judiciary, often only represents an act of conscience on the part of the judge, who, during trial on evidence, does not subject the testimony to very scrupulous criticism, but, by way of compensation, gives a conditional sentence. Thus, conditional sentence, arising as it does from the abuse and disastrous effects of short-term sentences, and based, as it is on the maxim "for the first time a pardon, for the second the whip," is but an eclectic compromise grafted on the old trunk of penal law and procedure. Consequently, despite its seductive appearance, it seems destined, when the glamour of its first trial is passed, to fail practically to give all the good results, which its champions have promised in its name, although it marks, as we cannot fail to see, a step towards the positive system of social protection based on fitting the defense to the offensive power of the delinquent. Conditional sentence, for the very reason that it is grafted on the old classical trunk, has another very serious fault; — it forgets the victims of crime, for its champions continue to consider reparation in damages as a purely private interest whose rigorous application is recommended as a principle, but which is practically left in complete oblivion. It can be said that from this point of view conditional sentence is the reverse of a progress from the present state, for the victim has not in the case of assault or robbery the satisfaction of seeing his offender undergo punishment; and although it has been held by Flayer and others that punishment, even conditional, is still a punishment and that it implies the disapproval of public authority that recidivity is threatened, and that in every case it hangs over the head of the condemned until the expiration of his term.[1] This is not true. These statements are all very well save in respect to recidivity, which supposes a repetition which can be but a slight solution of the crime by him who has been conditionally sentenced; and this can give very little satisfaction to the victims of the first crime.

But these statements are theoretical and impractical. What actually remains in the mind of the victim is that the cause of his damage is unpunished. This, of course, is true, but the

[1] *Fayer* cited by *Worms*, in the "Bulletin de la société des prisons de Paris" (1901), p. 380.

honest people who have suffered by their act deserve still more regard. I believe, therefore (disagreeing with Garofalo's proposal at the meeting at Brussels that a conditional sentence must only be imposed with the consent of the victim [1]), that it should be granted only when a reparation in damages has been effected or guaranteed by the delinquent, either directly to his victim or to the State if it has indemnified the victim for the crimes according to our system. Finally, I believe that for occasional delinquents who commit petty crimes under circumstances that show that they are not dangerous, as I have already said, reparation in damages is sufficient. In case of occasional delinquents who have committed serious crimes for which reparation in damages is not sufficient punishment, there should be added in cases of intermediate gravity a temporary local exile, and in the gravest cases isolation for an indeterminate time in a farming colony with work, discipline, and general conditions less rigorous than those established in farming colonies destined for born delinquents and recidivists.

§ 348. Delinquents through Passion: Their Relative Impunity.

In the last place, there remains the category of those who have committed some guilty act in a transport of passion. It is evident that no punishment can be exercised upon individuals of this kind which will create an impulsion against the crime, since the very circumstances in which it is committed make any efficacious legislative menace impossible. I believe, therefore, that in the typical cases of delinquents of this kind when they present a psychopathic form which marks them for inmates of the criminal insane asylum, ordinary jail sentences are ineffective, and that they should be condemned to a rigorous reparation in damages caused to their victims. This will suffice for their punishment, even when their sincere and deep remorse does not punish them sufficiently. A local exile for an indeterminate period can be added, which will remove them from the place where the crime has been committed or the residence of the family of the victim. Naturally, it must be kept in mind that we are speaking here of delinquents whose transport of passion is typical and who present the special characteristics of that type. The case is different in dealing with delinquents who have been simply provoked and who want the characteristics of this class,

[1] B. U. I. D. P. (1899), I, 149.

for example, those who commit homicide through anger or temperamental lack of balance.[1] Such individuals belong really to the category of occasional delinquents, and should be so treated.[2]

§ 349. Summary of Practical Reform.

We have thus sketched the general criteria of the practical system of preventive and repressive social protection against the different categories of delinquents in accordance with the positive inductions of the scientific study of crime considered as a natural and social phenomenon.[3] This defensive system must necessarily, in the natural course of events, be substituted for the classical criminal and penitentiary systems, as soon as, on one hand, crime is considered as a symptom of individual and social pathology, and not as the action of a free and evil will, and, on the other hand, as soon as daily experience shows by results that the conviction (already more or less accepted, but which will become general) that the present systems in regard to their theoretical doctrinarism and more and more disastrous practical effects, are incompatible with the necessities of social life.

[1] *Bonanno,* "Il deliquente per passione"; *Puglia,* "Intorno ai delinquenti per passione," R. C. (May, 1897).

[2] In the case of political delinquents, those who, apart from holding heterodox opinions, may because of their beliefs commit some actual offense, the punishment for the anthropological category to which they belong must be applied. But it must be kept in mind that the special character of their personality (generally normal) and of their specific criminality (evolutive) requires them to be given much freedom. They need only be exiled or imprisoned for some period, and need not be disciplined as ordinary and atavic delinquents. See *Lombroso* and *Laschi,* "Il delitto politico," P. II, Cap. II.

[3] It is noteworthy that *Tolstoi* in "Resurrection" (P. II), while unjustly reproaching the positive school with neither asking nor solving the question of the right of punishment, psychologically classifies prisoners almost as it does. He gives five classes; I, victims of judicial mistakes; II, delinquent because of a state of abnormal irritation, drunkenness, jealousy, etc.; III, authors of "Mala prohibita"; IV, delinquents of a more than average morality (evolutive delinquency); V, habitual delinquents, among whom certain "types of delinquents who, according to the Italian school, pay the hereditary debt of their ancestors."

CHAPTER VII

CONCLUSION

The future of penal science and practice. Relation between penal law and criminal sociology and criminal sociology and politics. Value of origin of crime as a basis of criminology. Ultimate significance of new discoveries and methods. Penal procedures in the future. Penal science in the future.

§ 350. The Future of Penal Science and Practice.

TURNING our attention to the general conditions of modern scientific thought which has led us to apply a new method to the study of crime and punishment (thus giving rise to the new science of criminal anthropology), and recalling particularly the essential results of criminal anthropology and statistics, one definitive conclusion is inevitable: Henceforth, criminal science, while remaining a juridical science in its results must nevertheless in its basis and its means of research become a branch of sociology. Consequently a preliminary study of anthropology and statistics as far as these sciences study criminal men and his anti-social activity is a prerequisite for it. The study of social phenomena, that is to say, of human activity in the social organism, constitutes the science of general sociology. This was the great lesson taught by August Comte. It has since been divided into a number of particular branches, following the special order of social phenomena to be studied. The struggle for existence can be borne by every man of normal activity. In other words, it can be made coördinate to the conditions of existence of other individuals and of society as a whole, or else subjected to the disturbing action of the natural factors already pointed out. It can be carried on through an abnormal activity, that is to say, contrary to the conditions of individuo-social existence.

This shows why particular sociologies develop in two distinct but not separate directions (because both begin with general sociology); some studying normal human activity, social or juridical; others studying anti-social or anti-juridical human activity. Thus, as in the organic order with the common basis

of general biology (the science of individual life), physiology, and pathology are distinguishable as special studies of normal and abnormal vital phenomena; so in the super-organic order (as Spencer said, perhaps inexactly) on the common basis of general sociology (the science of social life) economic, juridical and political on one hand, and criminal sociology on the other, can be distinguished for the special study of normal and abnormal social phenomena. This explains why it was said in the Introduction to this book that the innovation instituted by the positive criminal school is not confined to a simple alliance of criminal and penal law with criminal anthropology and statistics, but that it is in reality a radical reform in scientific method and organism which takes place in the new science of criminal anthropology which is made up of criminal anthropology (by the study of organic and psychic facts) and statistics on one hand, and, on the other, by criminal and penal law, which are only special chapters on it. These ideas, however,[1] which have been approved by the greater number of positivists have met ordinary eclectic reserves and restrictions, not only, as was natural, at the hands of classical criminologists, but also at the hands of certain men who, however, sympathize with and accept the theoretical and practical conclusions of the positive school. It is necessary, therefore, to say a few words on the relations between penal law and criminal sociology on one hand, and criminal sociology and politics on the other.

§ 351. Relations between Penal Law and Criminal Sociology, and Criminal Sociology and Politics.

Puglia, a determined follower of the positivist school, began by declaring his belief that "criminal science, even with the aid of the natural and social sciences, is, of course, sociological, like all juridical sciences," and that it maintains unaltered its nature of a purely juridical science.[2] He adds that criminal anthropology, criminal sociology, penology, the science of preventive law, and criminal statistics should all, within their own spheres, deal exclusively and separately with their respective objects.[3]

[1] *Ferri*, "Il diritto di punire come funzione sociale"; "La scuola positiva di diritto criminale" (Sienna, 1883), p. 31; "Socialismo e criminalità," pp. 16, 40, 42, 43.

[2] *Puglia*, "Il diritto di repressione" (1882), p. 25.

[3] *Puglia*, "Risorgimento ed avvenire della scienza criminale," p. 52. *Puglia* in the "Autonomia della scienza del diritto penale," but in reply to the criticism in my third edition he advanced no new argument.

Without taking up the incompleteness of saying that it is only a question of the natural and social sciences lending their aid, and not renewing it by a scientific method, and without speaking of the immutability which Puglia would oppose to all sciences as well as to all forms of life, this cellular system, which he would apply to the different groups of studies, which give information as to the genesis of crime and furnish conclusions for defense against it, is not only inexact in its isolated division but is discredited by the impossibility of working it. For the study of punishment, as a means of repression, would be docketed by Puglia under criminal sociology, penology, and repressive law, while crime favors the object of criminal anthropology, sociology, and the science of repressive law. This means that the effort to separate one study from another has failed and that there are continual points of contact between them — a proof that they link different parts of the same science as different organs of a complete organism, which can be distinguished but not isolated. Criminal anthropology and statistics, like criminal and penal law, are only different chapters of a single science, which is the study of crime (considered as a natural and social, and, hence, juridical phenomenon) and of the most efficacious means for preventive and repressive defense of society.[1] But, many Italians have adopted Puglia's theory, and in other countries it has been advocated by Gretever, Liszt, Garraud, Serejewski, Gauckler, and Meinrick,[2] among others. They hold that penal law studies crime and punishment as "Juridical phenomena" (while sociology studies them as "social phenomena") with a triple object — to describe delinquency in the past and present — to determine its individual physical and social factors — to indicate the means to combat it. As can be seen at a glance, the old concept

[1] Thus, *Dorado*, "La sociologie et le droit pénal," A. I. I. S. (1895), I, 305 *et seq.*

[2] *Gretener*, "Ueber die italienische positive Schule des Strafrechts," in the "Zeitschrift des Bernischen Juristenvereins" (1885), XX, I; *Liszt*, "Lehrbuch des deutschen Strafrechts," 2d ed.; "De la répartition géographique des crimes dans l'Empire allemand," A. A. C. (March, 1886); *Garraud*, "Rapports du droit pénal et la sociologie criminelle," *id.* (1886), Vol. I; *Sergejewski*, "Das Verbrechen und die Strafen als Gegenstand der Rechtswissenschaft," Z. G. S. (1882), p. 211; and its review by *Frassati*, "Die neue positive Schule des Strafrechts in Russland," *id.* (1890), X, 5; and "La nuova scuola positiva in Italia ed all' estero" (Turin, 1891), p. 229; *Gauckler*, B. U. I. D. P. (1893), IV, 37; *Dallemagne*, "La sociologie criminelle"; *Tarde*, "La sociologie criminelle" (September, 1893), with monographs by *Garofalo* and *Liszt; Meinrich*, "Strafrecht und Kriminalpolitik," Z. G. S. (1897), XVI, 779.

of juridical phenomena, which we have met before, in the distinction made by the classicists between social and juridical defense, lies at the bottom of the alleged separation. But, admitting (as must be admitted) that juridical phenomena are really social, because law and society are inseparable and correlative terms, the artificiality of thus separating the science which studies crime as a juridical phenomenon from that which studies it as a social phenomenon becomes apparent at once.

Criminal and penal law, as a science existing "per se," can only be understood by continuing the classical concept of crime as an abstract juridical entity, separated from natural reality, which is its proper sphere. It is incomprehensible, when it is admitted, as most writers admit as an inevitable concession to the facts established by positive science, that the juridical phenomenon of crime is only a social phenomenon, provided that crime exists as a natural fact whose diverse factors and aspects can be predicted and studied, but remain commonly inseparable. As it would be absurd to separate the study of the individual factors of the crime, from that of its social factors, it would be absurd to pretend to separate the study of its natural and social aspect from that of its juridical aspect. The scientific and experimental study of the crime, and, as a consequence, of the preventive and repressive means which may protect society from it — this is what constitutes criminal sociology, a science both unique and complex. This does not militate against distinct, although parallel and inseparable, subdivisions, according to the special aspects of the criminal phenomenon and of the means of combating it. It is strange that Liszt, for example, would separate penal crime from criminal sociology (which he, like Puglia, mistakenly looks upon as a synonym of criminal statistics), when he refuses to admit that penology exists as autonomous science, and correctly reports it as a subdivision of the general science of crime and punishment. This alleged separation between penal law and criminal sociology has not only a theoretical importance, but a practical importance as well. The beliefs that the criminologists must study crime and punishment only as juridical entities, leaving it to sociologists to deal with crime as a social phenomenon in its natural genesis, and hence to prophylaxis to obtain preventative doctrines, and on the other hand making it the duty of penitentiary science to take up punishment as the practical application of an abstract legal rule, results (as in the

case of the classical school) that each one of these sciences goes its own way, without any relation between them, often suffering from opposition in object and method. Who suffers from this? Civil society, which remains defenseless against the attacks of criminals and can do nothing to ward them off, and the condemned, who is lost, a victim of the incoherent workings of a blind repressive mechanism.

An example. A kills B to rob him. This is a fact of daily occurrence under one form or another. It must be studied. Let us begin with the misdeed. The criminal sociologist studies the causes which have induced this man to commit murder. Up to the present, classical criminal science has not dealt with these at all, accepting the accomplished fact. In this it was wrong, as we must acknowledge, but, not to go too fast, it is well to recognize, also, that the criminal sociologist must have a knowledge of criminal anthropology and statistics and study the natural factors of this crime. The results of this study will be interesting, but it is better to accept the law of the division of labor. The criminologists study the murder as a juridical fact, seeing whether it was an attempt or a consummated homicide, whether or not there was a premeditation, and of what degree. But let him confine himself to such aspects of the act, or, at most, determine the punishment suited to the moral responsibility of the murderer. The police officer has, unfortunately, nothing more to do in the case, but he is on the lookout for more homicides, — by watching suspects, closing saloons at a fixed hour, and preventing the carrying of concealed weapons.

The procedurist considers the best means for trying the murderer, remembering that he is a victim of social authority and that he must be protected from excess of power, and preventing him from merely appearing "pro forma" in arguments where the judge is concerned with the crime which he has committed, and the statute to be applied to it. If he is sentenced to a term in gaol, the penitentiarist must not trouble himself with the work of the sociologist, but study a system of imprisonment, remembering that, the term elapsed, he can free his prisoner without a moment's worry concerning his colleague's part in this strange collaboration. This is the course under the present system and it will continue if criminal sociology is merely added to the other sciences, which usually lend to penal law an indifferent assistance. This is so generally accepted that in treatises on penal

law, for example those by Garraud and Liszt, criminal sociology is mentioned in the introduction with the other auxiliary sciences, but thereafter the criminologist continues his ordinary syllogistic work on crime and punishment "as juridical phenomena," or abstract entities, without further thought as to the determinative conditions, or the execution and effect of the penal sanctions which he prescribes. And, criminality, an unhealthy weed, grows vigorously and extends constantly deeper roots in the enormous soil of continuity which exists in the text of the statutes, the sentences of the judges, and the organization of prisons and preventative measures. But, positivists believe that the phenomenal order is a unit, that the science, which studies causes, conditions, and remedies, must also be single. Of course, the criminal sociologist cannot "ex hoc" be an anthropologist, statistician, and penitentiarist, as every positivist has been until the present, because, as every one knows, division of labor cannot exist at the beginning of science, but he cannot remain a stranger to the studies and results of these special sciences, which are subdivisions of the more complex sciences. The economist-sociologist cannot "ex-professo" know chemistry, physiology, psychology, and statistics, and yet he cannot be a sociologist unless by studying the relations between the results of these particular studies and economic phenomena, he knows, follows, and applies the fundamental inductions, which they furnish.

And in criminal sociology, there is a most intimate connection among the parts which compose it, for the reason that they all bear upon a single fact, complex and many-angled, that is, on crime and the necessity to which it subjects us of defending ourselves against it, either by preventing its manifestations or reprimanding its author in the most effective way. The separation between penal law and criminal sociology has recently appeared in a form less ingenuous and less frank. It is alleged that criminal sociology is not an auxiliary science of criminal law, but is the same as criminal politics, "Kriminal-politik." Furthermore, Liszt, who reproduces many of the conclusions of the positive school, without speaking of those from whom he has borrowed them, states that he does not believe in the existence of criminal politics, based on criminal biology (anthropology) nor in criminal sociology (statistics). Developing the idea, which he once offered, he defines it as "the systematic sum of principles founded on the scientific examination of the origins

of crime and the result of punishment, principles in accordance with which the State must fight delinquency by means of penalties or analogous institutions." And this criminal politics will always be separate from penal law properly so called, which deals with crime and punishment in a technical juridical aspect.[1] Liszt, too, does not accept all the results furnished by criminal anthropology, but putting this aside, his concept of criminal politics is equivocal and antagonistic. It is equivocal if he considers criminal politics to be the science of criminology studied by the positive method as a natural and social, and not simply as a juridical phenomenon, for then criminal politics would only be criminal sociology. This was admitted by Liszt himself, that the new subdivisions of criminology and penology are incomplete, provided that in their inspiration of positive studies they regard only crime and punishment and do not embrace the sum of the penal sciences which he would designate in this connection by the phrase "gesamte Strafrechtswissenschaft."

But, on one hand, it is a mistake to make criminal sociology a synonym for criminal statistics, in order to do away with the comprehensive title of criminal sociology, which is its only exact and complete name; and on the other hand, this new isolation of penal law as a technical juridical study of crime and punishment outside of the alleged criminal politics (taken in the larger sense) and a pure scholastic exercise of abstract theories is incomprehensive. This definition of criminal politics is chiefly erroneous because, if there really can be criminal politics, it can only be the practical art of fitting the general conclusions of criminal sociology to the particular exigencies and conditions of each country and historical phase. Such is the significance, given by the old German jurists to the expression "Kriminalpolitik," as is proved by the phrase of Hencke, whom Liszt quotes, "Whoever would seek the basis of criminal politics even theoretically, and more particularly, whoever is obliged to apply this science as a legislator, must endeavor first of all to

[1] *Liszt*, "Kriminalpolitische Aufgabe"; "Die psychologischen Grundlagen der Kriminalpolitik," Z. G. S. (1896), XVI, 477; "Lehrbuch des deutschen Strafrechts," Intro.

Varga, "Abschaffung der Strafknechtschaft," distinguishes criminal anthropology, criminal law, and criminal politics. *Gross*, "Manual pratique d'instruction judiciaire," 2d vol. (Paris, 1897), and "Kriminalistik," in the "Revue pénale suisse" (1897), p. 269. This is the art of gathering proof and detecting crime and delinquents, according to the data of anthropology and criminal psychology. See also, *Fahr*, "Strafrechtspflege und Socialpolitik" (Berlin, 1892).

understand the basis of human nature as well as its laws of development in time and space. Anthropology, in the broadest sense of this word, and the history of the evolution of peoples, comprise, therefore, the most indispensable knowledge for the study of criminal politics. It is no less important to study the origin of crime, for its birth is often due less to degeneracy or moral perversion in the evildoer than to the imperfection of the laws and institutions of civil society."[1]

§ 352. Value of Origin of Crime as a Basis of Criminology.

It thus appears that it is a question of the legislative art of fitting measures of repression and penal defense which the science of criminal law ("Kriminalrecht") abstractly establishes for the special conditions of each nation.[2] It is, therefore, a distinction analogous to that which common usage makes between criminal and practical sociology, although the sciences governed by the positive method do not freely accept this distinction between theory and practice which was inevitable when apriorism separated the abstract norms of science from the realities of daily life, as under the classical criminal school régime, among others. Thus, to conclude, either criminal politics must be taken in the theoretical sense of a scientific study of delinquency and the defensive means aimed to combat it, in which case it is equivocal, because this study inaugurated by the positive criminal school constitutes criminal sociology, while including also studies bearing on actual data (criminal anthropology and statistics), as well as those which deal with the inductions to be made from these facts (criminology or criminal law and theory, as well as preventive defense— equivalents of punishment and police— and repressive defense— reparatory, repressive, and eliminatory means or penology); or else the term criminal politics must be taken in the most exact sense, that is to say, as designating a practical art by which the legislators deduce the rules of criminal science from the heaven of abstractions for terrestrial realities.

Thus defined it can be accepted up to a certain point, although

[1] *Hencke*, "Handbuch des Criminalrechts und der Criminalpolitik" (Berlin, 1825), I, § 31, 29.

[2] This was said by *Berner*, "Trattato di diritto penale" (Italian translation, Milan, 1887); see also *Richard*, "La responsabilité et les équivalents de la peine," in the "Revue philosophique" (November, 1899). What Carrara called "pratique législative" (Turin, 1874); which he thought was only the practical art of formulating the abstract rules of criminal theory into law.

the experimental method considerably diminishes the distinctions and differences between theory and practice, principles and facts; for in the positive sciences, theory can only be practice systematically observed, and practice can only be theory put in action. So, as has already been said, in the penal doctrine and legislation of the future, there can be no more excuse for the multitude of intricate discussions on the pathological reasons of irresponsibility, attempts, complicity, recidivity, and the accumulation of crimes and punishments, while in penal procedure there will be no place for all the discussions on such themes as appealability and irrevocability of sentences, etc. In the second Italian edition of this book it was stated, therefore, that a knowledge of the application of the experimental method to social and juridical sciences, introduced by the modern tendency of scientific thought, would recreate civil law as it had already recreated the science of crime and punishment; and this statement has been fully verified. As, however, in political economy a positive school grew up, which reached conclusions very different from those of classical and orthodox economics, so, above all in Italy, a new scientific current develops from day to day in the study of civil law which tends to free it from the remnants of the theories of ancient Roman law, which economic and social conditions, totally different from those of the modern world, inspired, and which was more and more influenced by an exaggerated individualism. On the 12th day of November, 1873, Carrara in his opening lecture on criminal law and penal procedure, concluded by commending the students to study the latter rather than the former, because in it "there remained something to be added to the work of our ancestors." [1] It is only too true that we must turn to the study of penal procedure, to which the Italian jurists have until to-day given too little thought. The principles of procedure are largely responsible for the fundamental criteria of the right of punishment, so it is necessary by application to the study of procedure to give a solid and permanent basis to that essential foundation of criminal law which is disturbed to-day by the new discoveries made by the natural and social sciences.

§ 353. Ultimate Significance of New Discoveries and Methods.

We can summarize in their ultimate significance the theoretical and practical innovations which the experimental methods and

[1] *Carrara*, "Opuscoli di diritto penale," Vol. V, p. 39.

the results of positive observation have introduced concerning the natural origin of the criminal phenomenon, and of the measures of social protection which must oppose it. Crime, in place of being the "fiat" of a free and evil will, is a natural phenomenon determined by anthropological, telluric, and social factors, and as such is a symptom of individual and social pathology. The remedy against criminality cannot, therefore, consist in the panacea of punishment alone; or cannot so exist against all forms of crime, vitiated as it is by traces of the violence and torture of the Middle Ages, and at the same time by the illusory pretension of measuring the moral fault of the delinquent and applying a proportionate punishment thereto. The increase of criminality, in general, and above all of the criminality of minors, as well as the spreading disease of recidivity, prove how powerless the classical systems are, both in defending society and in saving individuals from a progressive degeneration. Penal justice, unforeseeing and disorganized in its diverse branches, must, therefore, be transformed into a function of preservation from the disease of crime. It must rely more on measures and methods of social prevention than on the violence of a brutal repression, always powerless to suppress or decrease its effects, while leaving its causes untouched.

This social prevention, founded on the distinction between atavic and evolutive criminality can rely in regard to this latter function in the ultilization of rebellious energy by directing it in forms of social activity. Against the pathological impulses of atavic criminality, it should consist in the elimination and attenuation of the causes of individual and social degeneration, and in establishing a generally better economic and social order.[1] And when in spite of the measures and cares of social prevention, the criminal phenomenon manifests itself under residual and inevitable forms, like every other form of acute or chronic pathology, the defensive function, without any spirit of vengeance, hate, torture, intimidation, or ethico-juridical retribution should be exercised in a manner essentially different against forms of atavic and of evolutive crim-

[1] *Lombroso*, "L'uomo delinquente," 5th ed., Vol. III, concluded with the idea of symbiosis, that is, the utilization of the energies which determine crime. But if this solution should be accepted for forms and tendencies of evolutive criminality, it must be complemented by the idea of isolation for the forms of atavic criminality. Let us add that for all forms symbiosis, applicable in the transitory period, would be less efficacious than a profound change in the condition of individual and social existence, as is stated and foretold by socialistic sociology, for it will suppress the epidemic forms of occasional or habitual criminality, and only isolated and acute forms will survive.

inality by adaptation to the special anthropological category of the delinquents according to the act committed, but above all, according to the determinative motives. Measures of social defense should be reduced either by reparation in damages (in cases of petty crimes by far the most numerous, committed by less abnormal delinquents for inexcusable motives) or to isolation for an indeterminate period in asylums for the criminal insane or farming colonies under a discipline differing according to the different anthropological characters of the inmates.

§ 354. Penal Procedure in the Future.

Procedure should reduce itself to a scientific systematization embracing a judiciary police (for the collection of evidence), where the defense will be, like the prosecution, a public function, when the judgment will be entrusted to independent magistrates who have undergone a technical course, and where sentences will be periodically revised during execution by permanent technical committees who will rigorously limit the period of isolation to the time necessary for social adaptation. This isolation should, like that to which the uncriminal insane are subjected, consist only in the hygienic discipline of work without any trace of the barbarous torture and bad treatment of the past. Only the necessary clinical and therapeutic restrictions will be applied, as is done to-day in the case of patients in hospitals and insane asylums.

§ 355. The Penal Science of the Future.

Criminology will be in an entirely different moral world. Classical criminal science was based on the ethico-religious idea that man, the lord of creation, was the agent and arbiter of his own destiny, and that consequently, even on earth, through an anticipation of the eternal judgment in the world to come, which in its turn was an anthropomorphic reflection of terrestrial judgments, man should be judged for his moral fault, and punished accordingly.[1]

[1] Thus, as in the realm of theory, as I have said, criminal sociology is to penal law what psychiatry is to demonology, chemistry to alchemy, astronomy to astrology, so, in practice, Roberty's statement has been found true: "Criminality and penality, as understood and practised to-day, will be relegated with a mass of other social phenomena, such as cannibalism, human sacrifices, the primitive family, and the early forms of ownership, the ancient city and feudalism; phenomena which have left traces but which are modified and changed to such a degree as to appear dead and buried." *Roberty*, "Des fondements de l'éthique" (Paris, 1878), p. 75.

But the naturalistic philosophy from the year 1850, impelled by the new data furnished by the experimental sciences from astronomy to biology, and from zoölogy to sociology, has completely dissipated the moral and intellectual mists left by the Middle Ages. Man, descended from the high pedestal on which he had placed himself and become an imperceptible atom in the vast ocean of universal life, recognized, as he had to do, willy nilly, that he was subject to the eternal laws of nature and life. How could it be possible, therefore, in criminal and penal science to still erect the syllogisms of the past on the old ethico-religious foundations of man as the absolute master of himself and morally culpable?

There was and still is, as we must reçognize, a grave crisis of morality and penal law, which is in the closest and most frequent contact with morals, but "ex morte vita." It is we who, by changing our manner of conceiving and explaining the world, believe that the world is going to ruin. Natural laws, however, remain what they have always been, and the world keeps the even tenor of its way regardless of the explanations of philosophers and the discoveries of scientists. The genius of Galileo and Newton has not changed even to the slightest degree the law of the phenomenon of gravity. The genius of Lavoisier and Wurtz has in no wise troubled the infinite variety of the molecular combinations in the chemical domain. The genius of Vesale and Darwin has not in the least altered the atomic dispositions or hereditary transformations of organic life. No more has the genius of Spencer, Comte, and Marx altered the scheme of social phenomena. The discoveries of these great men, and the inexorable scientific precision with which they have defined the laws which they have found, have only given us a knowledge each day more complete of the physical and moral world in the midst of which we live.

From the destruction of the old anthropomorphic illusions has arisen the fecund vitality of the new experimental knowledge. Can criminal science still remain a stranger to this prodigious renaissance in the method and induction of the natural and social sciences, by remaining steadfast in a blind faith to the ethico-juridical dogmas which have until the present time served as its basis and which have received under the classical school a perfect juridical development from a logical point of view although experimentally illusory? Of course, if we would follow the lead of the most illustrious masters of the classical school we can only com-

mend and study their magnificent treatises, but no limit can ever be placed to any science because the eternal advance of natural facts will always give new direction and new fields to new evolutions. This is why we profit, with sincere gratitude, by the work accomplished before our day by our predecessors, not only in their historic mission, which was a general lessening of punishment, but above all in the juridical study which they have made of crime, without which our science would not now be possible. And yet we consecrate ourselves to a new mission, the diminution of crimes. We enter, with the natural study of crime and the principle of social responsibility, upon a road that the jurists have not yet attempted, and whose difficulties we recognize without fear, because combat was always a condition of victory.

And while some deny our school "in order not to desecrate the scientific heritage which was the glory of our fathers," we believe that there are two means of avoiding such desecration. We can either receive it and transmit it intact to our successors by simple labor of scientific repetition, and this is the more pleasant and agreeable way; or we can, through our efforts, give it greater weight and richness, which we believe is the first duty of scientists. Every age has its mission. In science, as in politics, the older generation must be conservative, and the younger radical, if the rhythm of human life is to continue in conformity with the laws of nature. The explanation of the positive school in Italy and elsewhere during the few years that it has existed constitutes an additional fact which it is sufficient for us to recall in the conclusion of this book, because it is a good augury for the future of penal science and practice. Positivism possesses, among many advantages, that of increasing true modesty by teaching us to seek the complex causes of each fact, and yet we take credit for the constantly increasing expansion of this study, due doubtless to our enthusiastic and indefatigable work, but even more to the correspondence which exists between our ideas and the manifest realities of daily life. It is this correspondence which gives a promise of future triumphs, which we await without too much impatience, with the security of the strong with no intolerance, and with the calmness of the soul which trusts to the labor and justice of the future. In the course of my philosophic studies, when I first read "Homme Machine" by Lamettrie, I was remarkably astonished that such a book had condemned its author to execution in effigy, for it only expressed ideas which to-day are for the most part admitted, even

by the spiritualists and by public opinion. I was astonished, but I took consolation in the evident proof that nothing stops the progress of ideas. Since then I have seen a reproduction of the same fact every time that I have begun a new study. The ideas of Beccaria, to-day orthodox and classical, created the greatest possible hostility in their day. Forty years ago in the scientific reviews, for example, in the "Annales medico-psychologiques," I read propositions and theories which then were the object of anathema at the hands of official scientists, and whose triumph is now so complete that they have become commonplace truths. In science, as in life, the conservative of to-day calmly admits ideas which a few years before were only held by the most thorough radicals. Progress is inevitable, because life is movement. And furthermore, social progress is, to borrow a formula of mechanics, a uniformly accelerated movement.

This is not all: I have seen, also, that the triumph of an innovation never completely effaces the prior ideas in so far as they conform to truth: no theory is entirely false or entirely true. In each new distinction, says Ardigo, what was formerly indistinct persists as a basis. So it is with scientific thought, whose development is not and cannot be a sterile succession of total negations and absolute affirmations, such as those presented by metaphysics, but, on the contrary, must be a progressive evolution of new growths on the old trunk of primal truths, with an eternal progressive revival. A large number of the partial ideas and inductions of the new criminal science renewed by the positive method, will fall, as is the common destiny on the road to the future. But that which will remain unshaken, is the humane idea of the delinquent introduced by criminal anthropology. And also is the purification of penal justice deprived of what remains of the spirit of violence and torture of the Dark Ages, a purification necessitated by criminal sociology, so that it may become a clinical function of social preservation against the sporadic cases of criminality (traumatic or psycho-pathological), which will continue to exist in a better organized society.

Hence, penal justice as an establishment of violent repression and class domination is destined to disappear, and to exist only as a clinical function. This is true because the development of penal justice has always been and will always continue to be in inverse ratio with the development of social justice. As ordin-

ary justice develops and organizes, the importance of penal justice will diminish, and as justice ceases to be a coercive external and material mechanism, it will become more and more an intimate general organic sentiment, the product of a social environment which will insure to every man the material and moral conditions of everyday existence. This means that the disappearance of penal justice as a political institution will coincide naturally and necessarily with the universal predominance of justice as a specific sentiment and force in social life.

As has been said elsewhere,[1] criminal sociology, as well as criminal science will finally lose its importance, for it will dig its own grave, because through the scientific and positive diagnosis of the causes of criminality, and hence through the indication of partial and general individual and social remedies to combat it in an effective manner, it will reduce the number of delinquents to an irreducible minimum, where they can enter into the future organization as a daily modification of civilized society, and where the less penal justice there shall be, the more social justice will necessarily follow.

[1] "Leçon d'ouverture au cours de sociologie criminelle à Bruxelles," in the "Revue universitaire" (December, 1895).

INDEX

A

Acquittals, table showing number of, 219.
Action, conviction impossible when free will lacking, 375; determinative motives of, 423; environment controls, 293; evolution of, 291; heredity controls, 293; moral freedom of, 290.
Alcohol, crime increased by, 249, 252; imposts decrease crime, 248; remedies against, 255; therapeutic remedies, 257.
Anthropological Criminal School, genesis of, 40; methods of, 43.
Anthropological Criminal Type, existence of, 86.
Anthropological data, misitation basis of criticism, 64.
Appeals, State's right to, 448.
"A Priori" method, criticism, 16.
Assassins, cranial indices of, 55.
Assizes, habitual delinquency, 136.
Atavism, crime proceeding from, 107; organic and psychic, 67.
Attempts, criteria applicable to, 430; legislative provisions against, 430.
Auburn Prison, discussion of system, 541.

B

Beccaria, criminal school of, 2.
Beggars, children degenerate, 275.
Bertillion method, identification of criminals by, 34.
Bigamy, prevention of, 270.
Biological data, applied to criminal law, 436.
Born Criminals, capital punishment of, 527; classification of, 144.
Born Delinquents, determination of, 27.
Brussels, Congress of Criminal Anthropology, 26.

C

Capital punishment, born criminals not to receive, 528; infrequency, effect on crime, 532; infrequent, tendency to increase crime, 530; intimidating effect of, 531; utility questionable, 528.
Carnivorous food, tendency to homicide produced by, 58.
Carrara, theory of, 4.
Categories, differences are of degree only, 157.
Cells system, opposition to, 34.
Cellular system, aberrations of nineteenth century, 542; attempts to prevent, 541; description of, 540; recognized inefficiency, 440; reform not provided by, 543.
Cephalic index, propensity to homicide, 47.
Cereals, crime increased by, 210.
Cerebral volume, psychic development not wholly determined by, 59.
Childhood, neglect causes crime, 275; neglect produces crime, 261.
Children, abandonment produces crime, 275; convict fathers produce degeneracy, 275.
Churches, luxury produces crime, 271.
Civilization, pathological incidents, 178.
Civil Law, relations to criminal law, 413.
Colajanni, criticism of classification, 189.
Complicity, criteria applicable to, 431.

Conditional sentence, description of, 548.
Congenital tendencies, environment may overcome, 63.
Convicts, reparation to man unjustly convicted, 452.
Corporal punishment, discouraged, 506.
Craniological data inferior in form of skull in murderers and thieves, 48.
Crime, abnormal act, 103; abnormality affecting, 116; abolition of certain, 454; abstract study useless, 13; accountability of criminal, 365; actual increase, 185; alcohol related to, 256, 257, 258; annual variations, 209; anthropological factors, 186; Bahar's definition, 83; biological bases, 84; complete suppression unattainable, 385; complex origin and nature, 115; connotation changes, 75; criminal traits do not always produce, 70; damages and conditions of, 509; definition of, 74; diminution object of positive school, 18; drunkenness the cause of, 253; Durkheim's definition, 82; ease affects, 181; eclectic definition, 82; economic basis of, 116; education affects, 181; evolution of, 178; foodstuff's price causes increase, 246; fundamental basis the same, 76; impossibility of complete suppression, 24; increase in serious crimes, 202; judicial repression, 217; juridical entities impossible, 12; legislative repression, 216; leniency of repression 218; meat, cereals and wine increase, 210; moral prevention of, 239; nature and origin of, 100; new data applied to, 436; numerical increase, 182; origin of value as basis of criminology, 562; pathological nature of, 285; periodic movement of, 195; permanent increase, 198; phenomenon of biologico-social abnormality, 122; physical factors, 187; prevention and repression, 278; prevention better than punishment, 225; preventive means, 25; prognostication impossible, 213; punishment does not diminish, 38; ratio of civil and penal justice, 188; regularity of, 212; reparation to victims of, 269; repressive forces, 279; severity of repression, 218; social factors, 187; social prevention, 564; social prevention effective, 278; social progress prevents, 281; social sanction relating to, 345; sociological bases, 84; sociological definition, 80; table showing increase, 200; table showing increase in serious crimes, 204; table showing source of, 102; table showing unknown perpetrators, 222; unpunished crimes cause increase, 221; vagabondage increases, 261; variation among social groups, 104.
Crimes, against property, recidivity, 133; social factors predominate, 74.
Crimes against the person, recidivity, 132.
Criminals, abnormal men, 38; accumulation of criminal traits necessary to mark, 69; anatomical characteristics, 94; anthropological or professional, 92; circumstances restraining, 70; criminal insensibility, 49; differ from other men, 14; eclectic type non-existence, 388; face large in, 67; five categories, 159; heredity and environment, involuntary tendencies, 99; inexactness of comparison, 55; lack of foresight, 49; method of study of, 52; moral insensibility, 49; natural characteristics, 88; organic constitution, 186; outdoor work as a cure, 543; passion producing, 152; personal characteristics, 187; psychological study of, 10, 53; physical data, 49; psychical constitution, 186; public defense of, 471; saturation law of, 209; scientific study of, 10; self-indulgence, 50; separation of, 350; social accountability of, 432; thirty per cent punished, 15; women less frequent than men, 64, 65.

Criminal action, individual first forms, 451; individual second forms, 524.
Criminal Anthropology, objections to, 52; proper subject of, 79.
Criminal evidence, data derived from, 469; phases of, 464; use in criminal biology, 470.
Criminal Insane, discussion of, 139.
Criminality, anthropological forms, 86; anti-human distinction, 85; anti-social distinction, 85; born criminal category, 144; classification of, 125; conditions of, 421; connotation does not change, 75; five categories, 138; forms distinguished, 336; physiognomy, 87; prevention of crime as duty, 283; state of, 404.
Criminal justice, impersonality of, 456.
Criminal Law, definition of, 328, 329; denial of moral liberty affects, 308; entity theory wrong, 12; evolution applied to, 36; existence of too many laws, 437; legislative reforms, 441; moral freedom does not sustain, 305; positive method, 7; positive school of, 1; prevention the object of, 230; relations to civil law, 413; science to limit, 337.
Criminal Lunatic Asylums, discharges from, 524; expense, 522; inadequacies, 523; necessity of, 521; objections to, 522.
Criminal Sociology, illustrations of applications, 559, 560; origin of, 1; practical reforms, 436; programme of, 36; relating to criminal law and politics, 556.
Criminal statistics, biological aspect of, 174; data of, 168 et seq.; ethico-social inductions, 173; methods of collecting, 168; use and abuse, 171.
Criminals through passion, impunity of, 553.
Criminal traits, hereditary transmission of, 95.
Criminal type, objections to determination, 88.
Criminologists, illustration of applications, 559.
Criminology, classification doctrines fail, 14; origin of crime as basis, 562; pathological impulses of, 564.
Criminaloids, perversity lacking, 157.
Crofton, discussion of system, 541.

D

Data of Anthropology, explanation of disagreement, 62.
Deductive method, criminal law must use, 24.
Defective nutrition, crime proceeding from, 110.
Defense of society, conclusion of names, 422; definition of reason of, 326; discussion of reaction, 314, 315; eliminative means, 419; evolution of, 311; four classes of defensive measures, 415; fundamental criteria of, 502; moral liberty not involved in penal evolution, 321; objections to theory of, 323; objections to theory of defensive justice, 325; penal law development toward, 320; positive means of, 414; reparation does not constitute, 323; repressive means failure, 498; vengeance and hate eliminated from, 564.
Degeneracy, alcohol causes, 254; delinquency proceeding from, 108.
Delinquency, abnormality as origin of, 105; biological abnormality as basis of, 110; cause must be sought, 127; habitual and occasional, 127.
Delinquents, abnormal men, 38; anthropological type, 100; biological type, 100; choice of defensive means for different categories, 515; prisons should be hospital for, 518; three sociological strata, 226; treatment by outdoor life and work, 544; wise treatment of, 435.
Deportation for life, failure as a punishment, 534.
Discharges, surveillance of prisoner's discharge, 460.
Dominant Class, influence in defensive law, 333.

Drunkards, children degenerate, 275.
Drunkenness, coffee diminishes, 253; crime increased by, 253; degeneracy from, 253.

E

Education, crime prevented by, 272.
Electricity, punishment by, 505.
Ellero, method applied to protection, 466.
Elmira Reformatory, correction of criminals, 276.
Emigration, crime increased by, 247.
Epilepsy, crime proceeding from, 106.
Ethnic traits, permanent as affecting criminality, 66.
Etiology, criminal, 100.
Europe, juries not adapted to, 491.
Experts, vicious use of, 470.

F

Facial development, decreases with intelligence, 67.
Farming colonies, outdoor work as a cure, 543.
Fatalism, free will denied not fatalistic, 303.
Fiscal charges, alcohol and crime remedied by, 255.
Five categories of Criminals, numerical proportions, 159.
Five classes, Colajanni accepts, 163; discretion of, 164 et seq.; Lombroso accepts, 163.
Foodstuffs, crime increased by rise in prices, 246.
Forgery, prevention of, 270.
Freedom of Action, environment limits, 293; heredity limits, 293.
Freedom of Intelligence, theories of, 374.
Freedom of Will, eclectic theories, 367; limited freedom denied, 297.
Free Will, autonomous being denied, 295; determinative motives hard to prove, 428; determining motives of action, 423; failure of as a defense, 427; Grote's theory denied, 296; illusions as to, 38; justice without, 413; negation of, 288; non-existence of, 57; objections to negation, 322; problem of justice without, 405.
Frontal protuberance, responsibility of him who has it, 47.

G

Gambling, suppression to prevent crime, 273.
Garofalo, works of, 7.
Gneist, theory of, 450.
Guilty, presumption of, 445.
Guyau, criticism of theory, 409.

H

Habitual Criminal, traits of, 146.
Habitual Criminals, classification, 545.
Habitual Delinquency, large proportion of, 133.
Habitual Delinquents, category of, 145.
Heredity, law manifested by tendency, 98; transmission of criminal traits, 95.
Holidays, crime produced by, 273.
Homicide, criminals through passion generally commit, 153.
Howard, criticism of doctrine, 5, 6; penitentiary school of, 5.
Human mind, indivisibility of, 295.

I

Ideal liberty, eclectic theories, 368.
Improvidence, criminal characteristics, 64.
Imputability, responsibility related to, 362.
Incorrigibles, treatment of, 536.
Incorrigibility, persistence of, 127.
Indeterminate sentence, good results of, 507.
Individual rights, equality with social defense, 446.
Individualism, exaggerated tenets of, 444.
Inheritance, murder prevented by testamentary regulations, 267.

Inhibitive centers, defective development leading to crime, 110.
Innocence, presumption of, 445.
Insane, categories of semi-insane criminality, 142; criminals and non-criminals, 386; determinative motives as applied to, 426; responsibility in crime, 357.
Insanity, history or treatment of, 356; moral insanity, 359.
Intimidation, effect on weak minds, 382; theory means, 387.

J

Judiciary, independence in criminal cases, 474; numbers of judges necessary, 475; professional judges tendency to convict, 490; qualifications in criminal cases, 476.
Juries, abolition necessary, 495; abolition of, 479; advantages and disadvantages, 481; arguments in favor of, 479; disadvantages of, 490; English and Continental distinguished, 392; Europe not adapted to, 491; evolution to the present time, 493; failure of justice through, 486; incoherency of action of, 487; institutional value, 482; personal capacity, 485; psychological constitution, 489; preservation necessary, 497; sociological constitution, 489; specialization of functions lacking, 494; value of institution, 479.
Jurisprudence, moral freedom theory hindrance, 307.
Jury system, see JURIES.
Justice, definition of, 331; exigencies of the idea, 373; free will not necessary to, 406.

L

Law, coercive authority of, 331; evolutionary phases of, 317; sanction of, 330; social phase of evolution, 318.
Law of numbers, deduction as to criminals not dependent on, 54.
Legal sanction, definition of, 331.
Liberty, equivocal meaning of, 301.
Life imprisonment, plan of, 539.
LISZT, criticism of theory, 394; theory of, 393.
LOMBROSO, distinction of criminal categories prior to, 125.

M

"Mala in se," distinction from "mala prohibita," 77.
"Mala prohibita," distinction from "mala in se," 77.
Malefactor, distinction of, 531.
Mattoide, criminality categories, 142.
Memory, non-existence of, 295.
Moral conduct, organic conditions involve, 58.
Moral culpability, crime independent of, 345; defense of society means what, 351; social accountability preferable to, 352.
Moral freedom, limited freedom laws, 303.
Moral insanity, recognition of, 359.
Morality, penal lack of recognition, 316.
Moral liberty, equivocal meanings, 299; existence of, 289; non-existence of, 292; play on words, 299.
Moral responsibility, punishment not based on, 339.
Motives, science of motives denied, 425.
Murderers, craniological data, 48; distinction between character of, 60; fierce expression of, 93.

N

Neglected childhood, remedy in social reorganization, 276.
Neglected children, nourishment prevents degeneracy, 273.

O

Occasional criminals, short term sentence, 545.
Occasional delinquents, category, 154.

P

Pardons, abuse of, 448.
Penal judgment, judicial licenses, 457; lack of organization, 459; manifestations of, 461; proper function of, 462.
Penal justice, character of machinery and penal justice characters, 456; history of development, 318, 319; machinery of, 456.
Penal law, advance or tendency of, 320; criminal sociology related to, 556; moral liberty unconnected with, 321; positive basis of, 342; self-defense of society, 38.
Penal Laws, criminal sociology influences, 436.
Penal procedure, future of, 565.
Penal process, capacity of judiciary, 473; detection of criminal, 465; judiciary, 472.
Penal responsibility, problem of, 288; fundamental problems, 410.
Penal science, future of, 555.
Penal System, existing systems valueless, 499; bankruptcy of, 498.
Penalties, inequalities, 81; positive theory of, 288; repressive forces of, 236; segregation of, 502; substitutes, 243; substitutes of no importance, 282; table showing system of, 500.
Penitentiaries, science of certain, 517.
Penitentiary system, vices of, 3.
Personal identity, theory of, 401.
Phrenology, crime studied by, 41.
Physiognomy, crime studied by, 41.
Piracy, steam causes disappearance of, 267.
Poletti, criticism of theory, 392; theories of responsibility, 390.
Police, public and social defense, 450.
Political order, crime regulated by, 265.
Population, increase brings more crime, 206.
Positive school, practical applications of, 33; programme of, 18.
Poverty, crime increased by, 254; fines should be remitted in case of, 279.
Practical freedom, eclectic premises of responsibility, 371.
Practical reform, summary of, 554.
Precocity, index of born criminality, 150; mark of congenital tendency, 151.
Prevention, means of, 410.
Prevention of crime, science lacking, 283.
Prisons, easy life to be avoided, 519; hospital system necessary, 518; work necessary in, 520.
Procedural reform, principles of, 442; three general principles of positivist school, 442.
Pseudo-criminals, perversity lacking, 157.
Public improvements, crime decreased by, 248.
Punishability, eclectic theories of, 366.
Punishment, basis of right, 289; 360; certainty aids efficiency, 237; crime not prevented by, 214; criteria to determine, 421; deportation for life, 534; equivalents of, 242; equivalents useless, 245; evidence has no part in, 464; fundamental reason for right, 23; history of, 231; ineffective, 16; legal responsibility, 340; negative repressive force, 240; permanent punishment criticized, 533; physical imputability necessary, 339; practical reforms in, 508; preventive effect limited, 228; reparation in damages, 509; summary of, 236; table of theories, 367.

R

Recidivists, statistics showing relapses, 131.
Recidivity, statistics of, 129.
Religion, corrupt religion produces crime, 271; luxury of churches produces crime, 271; slight obstacle to crime, 271.
Repression, efficacy of, 233.
Responsibility, basis of, 309; eclectic theories, 364, 367; fundamental

principle applied to crime, 407; history determines basis of, 310; imputability necessary, 362.
Rights, development of, 366.

S

Saleilles, criticism of, 516.
Sanction, forms of, 331.
Sanctions, biological, 343; coercive, 344; physical, 343; social, 343.
Scientific order, crime repression by, 266.
Segregation, indeterminate, 537.
Semi-insane, treatment of, 525.
Severity, crime increased by, 234.
Short Term Sentence, failure and observations of, 550; substitutes for, 546.
Skull, face relatively large in criminals, 67.
Smuggling, duties less decrease, 247.
Social accountability, moral responsibility gives way to, 352.
Social defense, preventive means, 416; reparative means, 417; repressive means, 419; summary of methods, 420.
Social friction, crime unavoidable, 280.
Social sanctions, kinds of, 344.
Social sciences, positive method, 11.
Social selection, description of, 349.
Social similarity, theory of, 402.
Socialism, scientific theories, 334.
Sociological definition of crime, criticisms, 80 et seq.

T

Tarde, criticism of theory of, 398; statement or manner of, 396; theory of, 395.
Technical damages, fear of, 510.
Temperature, crime increased by, 211.
Thieves, craniological data, 48; repugnance to bloodshed, 91.
Ticket of leave, English plan, 541.
Track exercise, well developed lungs favors, 59.
Trials, penal process, 471; public advertisement necessary, 471.
Tribunals, habitual delinquency, 136.

V

Vagabondage, crime increased by, 255; history of, 262, 263.
Vagabonds, children degenerate, 275.
Vanity, criminal characteristics, 64.
Verdict, publicity the means of reaching, 465.
Verdicts, guilty, 447; not guilty, 447; not proven, 446; Roman, 447.
Victim of crime, remedy found in reparation to, 269.
Voluntarianism, acts existence doubted, 378.

W

Wine, crime increased by, 210.
Women, biological factors of, 65; criminality less frequent among, 64.

INDEX

Date Due

FEB 21 1947			
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